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# TRANSCRIPT OF RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 778

(21,734.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1911.**

## No. 75.

ALLEN A. BROWN, SABRA HODGKINS, MARY A. EVANS, ET AL., APPELLANTS,

*vs.*

THE ALTON WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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a In the Circuit Court of the United States for the Southern District of Illinois, Southern Division. In Chancery.

ALTON WATER COMPANY

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHton, James Schouler, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Dromgoole, C. H. Venner Co., and Cidele Venner.

1 Pleas in the Circuit Court of the United States of America for the Southern District of Illinois, Southern Division, Held at the City of Springfield, in said District, Before the Hon. J. Otis Humphrey, District Judge of said District, and in the Absence of the Hon. Peter S. Grosscup, the Hon. Francis E. Baker, the Hon. Christian C. Kohlsaat, and the Hon. William H. Seaman, Judges of the Seventh Judicial Circuit, on Friday, the Twenty Eighth Day of May, at the January Term of said Court, in the Year of Our Lord One Thousand Nine Hundred and Nine and of Our Independence the One Hundred and Thirty Third Year.

JAMES T. JONES, *Clerk*.

2 In Chancery.

THE ALTON WATER COMPANY

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHton, James Schouler, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Respondents.

Be it remembered that on the thirteenth day of July in the year of our Lord one thousand nine hundred and seven, came the Alton Water Company, complainant, by Levi Davis, Esq., its solicitor, and filed in the office of the Clerk of the Circuit Court of the United

States for the Southern District of Illinois, Southern Division, its bill of complaint against Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the estate of William Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co. and Cidele Venner, which said bill of complaint is as follows, to-wit:

3 *Bill of Complaint.*

Filed July 13, 1907.

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss.*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, W. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

To the Judges of the Circuit Court of the United States for the Southern Judicial District of Illinois:

The Alton Water Company, a corporation organized and existing under the laws of the State of Illinois and located and doing business at the City of Alton in the County of Madison and State of Illinois, brings this its ancillary bill against Allen A. Brown, trustee, Robert B. Wason, Harriet N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

4 And thereupon your orator complains and says that on or about the seventeenth day of November, A. D. 1900, the

ners Loan and Trust Company, a corporation organized and ing under the laws of the State of New York, filed a bill in equity he Circuit Court of Madison County in the State of Illinois, nst the New England Water Works Company, the Alton Water ks Company, the American Loan and Trust Company, trustee, nited Water Works Company, Limited, the Boston Water and t Company, the International Trust Company, trustee, Charles aldwell, trustee, Anson M. Lyman, trustee, and the unknown rs and holders of ten promissory notes of Five Thousand Dollars 00.00) each, dated June 5, A. D. 1900, signed by the New Eng- Water Works Company, payable to the order of Anson M. an and secured by a chattel mortgage from said New England r Works Company to Anson M. Lyman, trustee, dated June 5, . 1900 and recorded in book one (1) of Chattel Mortgages, at 136 in the Recorder's Office of Madison County, Illinois, pray- or the foreclosure of a certain mortgage or deed of trust bearing the First Day of January A. D. 1887, made by said Alton r Works Company to said Farmer's Loan and Trust Company ll the privileges, franchises, easements, choses in action, estates, erty, real and personal, effect and assets which said Alton Water ks Company then had or might, at any time thereafter during existence of said mortgage, acquire, and particularly including Water Works of said Alton Water Works Company at the City of and the water mains connected therewith and all other pipes of description then used in operating said Water Works and which t be used or laid in extending such water works and all property h might be added thereto in extending or operating said water s, in trust to secure the payment of bonds of said Alton Water ks Company aggregating the sum of Two Hundred Thousand rs ($200000.00). And in said bill of said Farmer's Loan and t Company it is also alleged that said mortgaged property had extended and enlarged and that watermains had been laid, in ection with said original water works, extending east from the of Alton into Upper Alton and several miles of water mains been there laid which are supplied with water only through from the water mains of said water works which were in opera- tion at the time of making said mortgage or trust deed, and that said additional water mains were purchased and laid with money derived from the sale of the bonds secured by said gage or trust deed and the earnings of said original water works ; and that there had also been built and installed a new pump- tation on the bank of the Mississippi River about a mile above umping works in operation at the time said mortgage or trust was made; that much of the machinery, especially the large which was in use in said old pumping station and which was r the lien of said trust deed, had been, by said Boston Water and t Company and the New England Water Works Company, d from said old pumping works to said new pumping works formed a large and effective part of said new pumping works he pump so taken from said old pumping works was the pump was then forcing water through all of said water works plant;

that such removal was made fraudulently and for the purpose of attempting to remove said machinery from the lien of the trust deed aforesaid and that the money used to acquire the property on which said new pumping works are situated and to build said new pumping works came through the earnings of the water works property so mortgaged as aforesaid; said bill further alleges that said mortgage or trust deed constitutes a first lien superior to the right of all the parties defendant named in said bill upon all of the water mains and pipes situated in Madison County and connected with or drawing water from said water works plant in existence at the time of the making of said mortgage, also a like lien on said new pumping works and the ground upon which it is situated and upon all the machinery, power and pumping plant thereon and upon all mains connecting said pumping works with the water works system in said City of Alton.

Said bill further alleges that after making, delivering and recording the said mortgage or trust deed and on or about April 24, A. D. 1893, said Alton Water Works Company made and delivered to said New England Water Works Company a deed purporting to convey to said New England Water Works Company all its property and said New England Water Works Company then claimed to be the owner of said property; that the said Boston Water and Light Company claims to own or have some interest in some of the property described in said bill and particularly in the new pumping works above mentioned; and that said Boston Water and Light Company did, in October, 1897, execute and deliver to said International Trust
6 Company a trust deed conveying all of its property in said Madison County to secure a possible issue of Two Hundred Thousand Dollars ($200,000.00) of bonds which document was recorded in the Recorder's Office of Madison County in book 253 of records at page 82; that said Boston Water and Light Company did also execute and deliver a supplement to said last mentioned trust deed or mortgage dated November 1, A. D. 1897 and recorded in the Recorder's Office of Madison County in book 257, at page 1, and that all the rights and interests of said Boston Water and Light Company and of said International Trust Company in and to all the property mentioned and described in said bill of complaint are subordinate to the lien of said deed of trust made by said Alton Water Works Company to said Farmer's Loan and Trust Company;

Said bill of complaint further alleges that the said Alton Water Works Company, New England Water Works Company and Boston Water and Light Company were under the control of C. H. Venner, that said Venner caused the large Allis Pump to be taken from the pumping works of said New England Company and placed in said new pumping works and without any compensation therefor to the New England Company; that the effect of said transaction between said Boston Water and Light Company and said New England Water Works Company was that the said new pumping works and the additional mains laid were so erected and laid by said New England Water Works Company as extensions of the water works plant so mortgaged to said Farmer's Loan and Trust Company

and said new pumping works and said additional mains became at once the property of said New England Company and part of said mortgaged property and all of it became subject to the lien of said deed of trust to the Farmer's Loan and Trust Company.

Your Orator further shows that prior to the filing of said bill of complaint the United Water Works Company, Limited, had filed in said Circuit Court of Madison County and State of Illinois its bill of complaint against the Alton Water Works Company, Farmer's Loan and Trust Company and American Loan and Trust Company, Chas. A. Caldwell, trustee, and Anson M. Lyman, trustee; that the two suits so brought by the bill of complaint of said Farmer's Loan and Trust Company and the bill of complaint of said United Water Works Company, Limited, were afterwards consolidated by order of said Circuit Court of Madison County and a receiver ap-
7 pointed by said Court in said consolidated causes who took possession of all of the property so mortgaged as aforesaid, including that mentioned and described in said mortgage or deed of trust to said International Trust Company as well as that mentioned and described in the mortgage or deed of trust to said Farmer's Loan and Trust Company; and thereafter said consolidated suits were removed to this honorable court and after such removal said New England Water Works Company, American Loan and Trust Company, Alton Water Works Company, United Water Works Company, Boston Water and Light Company, International Trust Company, trustee, Charles A. Caldwell, trustee, and Anson M. Lyman, trustee, appeared and filed their separate answers in this Honorable Court to the said bill of complaint of said Farmer's Loan and Trust Company.

Your Orator further shows that the said answer of the International Trust Company was filed on the 21st day of June, A. D. 1902, and, among other things, denied that any water mains laid in the Village of Upper Alton were ever laid by said Alton Water Works Company, its successors or assigns or with any money derived from the sale of bonds secured by said trust deed to the Farmer's Loan and Trust Company or with the earnings of said original water works plant or that the removal of said large pump from the old pumping station to said new pumping works was made fraudulently or for the purpose of attempting to remove said machinery from the lien of said trust deed to the Farmers Loan and Trust Company or that the money or any part thereof used to acquire the property on which said new pumping works are situated or to build said new pumping works or any part thereof, came from the earnings of the water works property so mortgaged to said Farmer's Loan and Trust Company or that said last mentioned trust deed constitutes any lien whatever upon said new pumping works or the ground upon which it is situated or any of the machinery, power or pumping plant (except said large pump) or upon any of the mains connecting said pumping works with the water works system in said City of Alton upon any theory whatever.

Said answer states the fact to be that said Boston Water and Light Company is the sole owner of the water mains connecting said new

pumping works with the water plant or reservoirs and stand pipes mentioned in said bill of complaint and also all of the water mains laid in the Village of Upper Alton; that said real estate upon which said new water works are situated was purchased by said
8 Boston Water and Light Company, with its own money in the year 1897, and the new pumping works, together with the filters therein and the machinery therein, except said large pump, and said water mains from said new pumping works to said water tank and said water mains in the Village of Upper Alton and several miles of water mains laid in said City of Alton were acquired, built, installed and put in by said Boston Water and Light Company with its own money and not with any money whatever of said Alton Water Works Company, its successors or assigns, or any of the earnings of the property or works of said Alton Water Works Company, its successors or assigns; and that the bonds mentioned in said two deeds of trust to said International Trust Company were duly issued and negotiated and constitute a valid indebtedness of said Boston Water and Light Company and were so negotiated and in the hands of bona fide holders for value entire prior to the filing of said bill of said Farmer's Loan and Trust Company, and are outstanding and unpaid; and the property of said Boston Water and Light Company was also acquired with the proceeds of the sale of said bonds.

Your Orator further represents, that said Farmer's Loan and Trust Company filed its replication to said answer of said International Trust Company and afterwards evidence was taken in said consolidated suits in this Honorable Court and a decree rendered therein on the 23rd day of December A. D. 1903, foreclosing said mortgage or trust deed made to said Farmer's Loan and Trust Company as aforesaid, and declaring, among other things, that the mortgage or trust deed dated April 28th, A. D. 1877, from the Alton Water Works Company to Charles A. Caldwell, trustee, mentioned and described in the bill of complaint of said Farmer's Loan and Trust Company to be the first lien prior to the rights *to* all the parties to said suit upon all the property in said trust deed and in said decree described and ordered to be sold and that the mortgage or trust deed date January 1, 1887, from the defendant, Alton Water Works Company to said Farmer's Loan and Trust Company is a lien upon all the property in said trust deed and in said decree described and ordered to be sold, subject only to the lien of said trust deed to said Caldwell and prior and paramount to the interests of all other parties to said cause, and that the mortgage or trust deed dated in October 1897, and recorded in that month in the Recorder's Office in Madi-
son County, Illinois, from the Boston Water and Light Com-
9 pany to the International Trust Company as trustee, is in all respects subject and subordinate to the said mortgages or deeds of trust to said Caldwell and the Farmer's Loan and Trust Company, respectively; and in and by said decree it was provided that unless said Alton Water Works Company, or some of the other defendants in said cause or some one on their behalf claiming through them, pay or cause to be paid in cash in thirty (30) days after the entry of said decree to Walter Mc. Allen, Esq., Master in Chancery

of this Honorable Court, the sums respectively found due by said decree under the said mortgages or trust deeds to said Caldwell and the Farmer's Loan and Trust Company aggregating Two Hundred and Fifty Thousand Nine Hundred and Six Dollars and Forty-three Cents ($250,906.43) with interest thereon from the date of said decree together with costs etc., then all the property decreed to be subject to the lien of said mortgages or trust deeds to said Caldwell and the Farmer's Loan and Trust Company and described in said decree, shall be sold as an entirety and all right and equity of redemption of the defendants and each and all of them in and to said premises, property rights, assets and franchises and every part and parcel thereof shall be forever barred and foreclosed.

The property so found to be subject to the liens of said mortgage trust deeds to Caldwell and the Farmer's Loan and Trust Company, as trustee, in the water works plant and system in Alton and Upper Alton in said Madison County, State of Illinois, now or lately owned or operated by the New England Water Works Company, including the water works property connected and operated therewith and claimed to be owned by the Boston Water and Light Company, all of which property is more particularly described as follows:

(*a*) A tract of land lying in the City of Alton in Madison County, Illinois, bounded as follows: Beginning at a stone in the east line of State street, where the south line of the northwest quarter of section eleven (11) in township five (5), range ten (10) west of the third principal meridian crosses State street; thence east along said quarter section line four hundred and forty-nine and eight-tenths (449.8) feet to a stone; thence north to a point where a line running along and with the southwest end of lot thirteen (13) in block one (1) in Hawley's addition to Alton shall intersect the same; thence along said last mentioned line and lot thirteen (13) to the southeast side of Vine street, as designated on the plat of Hawley's addition; thence southwardly along said Vine street to a point where a line crossing said Vine street at right angles will strike the southeast corner of lot eighteen (18) in Semple's addition to Alton; thence along the south line of said lot eighteen (18) one hundred and twenty-five (125) feet to a stone on the line of State street; thence southwardly along the line of said State street two hundred and seventy-eight (278) feet and six inches to a stone in the angle of State street; thence southwardly along the line of State street two hundred and ninety-seven (297) feet to the place of the beginning, upon which land is built a reservoir used in operating the water works; excepting, however, from said premises a small piece of land in the southwest corner of the same fronting about sixty (60) feet on State street, which has been sold to William Hope, who has erected on the same a two story brick house.

(*b*) Also a lot of land situated in the City of Alton in said Madison County, described as follows: A certain tract of land in the northwest part of the south fractional half of section ten (10), in township five (5) north, in range ten (10) west of the third principal meridian, in said Madison County, being part of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong

by deed dated July 15, 1891, and recorded in the recorder's office of said Madison County, in book 205 of records at page 203, and further described as beginning at the point of intersection of a line with low water mark of the Mississippi River which point of intersection is forty (40) feet northwesterly from the easterly or southeasterly line of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong as aforesaid; thence in a northeasterly direction two hundred (200) feet more or less to intersect the center line of the county road in said south fractional half of said section ten (10) so as to form at said intersection a right angle with said center line of said County road; thence north fifty-seven degrees (57) west along said center line three hundred (300) feet to a point; thence southwesterly and at right angles to said center line of said road two hundred feet, (200'), more or less, to the Mississippi River; thence southeasterly down the Mississippi River three hundred (300) feet to the place of beginning, including the land to the center thread of said river; together with the right to lay water mains across other lands belonging to Katherine Armstrong from the power plant and pumping works on the property described to the reservoir
11 and standpipes, and the right and easements to enter upon and make the necessary excavations and lay and maintain not more than three lines of water mains or water supply pipes through and across the remainder of the land so conveyed as aforesaid by Mary J. Armstrong and husband to Katherine Armstrong by said deed; said lines of pipe to run from said power plant and pumping works in a northeasterly direction across the remainder of said land so conveyed by said Mary J. Armstrong and husband to Katherine Armstrong in parallel course and not more than ten feet apart, the exact location of said lines of pipe to be left to the parties laying and owning the same.

(*c*) Also all the buildings, pumping works, power plant, filters, reservoirs, standpipes, water mains and all other property upon said above described real estate or in any way used in connection with the said water works plant; and all the *m*ater mains, hydrants, valves, pipes and other appliances connected with and which receive water from said power plant and water works system, laid upon or in any of the streets or other parts of the City of Alton and the Village of Upper Alton in said Madison County, and including all other pipes, machinery, appliances and property in any way connected with or used in the operation of said system of water works both those existing when a receiver was appointed herein and also added by the receiver:

(*d*) Also all privileges, franchises, easements, choses in action estate, property, real and personal, effects and assets which the Alton Water Works Company or the New England Water Works Company now has or at any time has had for the construction and operation of said water works plant.

(*e*) Also the franchise or privilege obtained in the name of the Boston Water and Light Company for laying and operating in Upper Alton the water mains and water works connected with and

drawing water from the system of water works hereinbefore described.

(*f*) Also all rents, dues, demands and choses in action of every kind and nature, including water rents from Alton, Upper Alton and private consumers arising from said water works system, with the right to collect the same.

And in and by said decree it is further provided that the purchaser of said property and his assigns, after the delivery of the premises and property to them, shall hold possession and enjoy the same with all rights, privileges, immunities and franchises
12 pertaining thereto as fully as said Alton Water Works Company and New England Water Works Company and Boston Water and Light Company or the receiver therein now hold or enjoy the same or held or enjoyed or were entitled to hold or enjoy the same at any time heretofore, and the purchaser and his assigns shall have and hold the property and premises so sold free and discharged from the lien or encumbrance of all the mortgage trust deeds in this decree mentioned and free from all claim or claims of every kind and of all parties to this cause and those claiming under them, as by said decree of record in this Honorable Court and ready to be produced, will more fully appear.

Your orator further represents that default having been made in the payment of said sums of money so found to be due under the said mortgage trust deed to said Caldwell and said Farmer's Loan & Trust Company respectively, said property described in said decree was afterwards, on or about the eighteenth day of April A. D. 1905, sold by said Master in Chancery of this Honorable Court under and by virtue of said decree to Samuel Peck, G. Randolph Laighton, Chas. G. Sanford and Russell Frost, and the report of said sale of said Master in Chancery was afterward approved by this Honorable Court, as by its order of record, and ready to be produced on the hearing hereof, will more fully appear; and thereupon said Master in Chancery executed *a* and delivered unto said Samuel Peck, G. Ralph Laighton, Chas. G. Sanford and Russell Frost, as purchasers at said sale, a deed dated the sixth day of May A. D. 1905, conveying all of said property unto them, the said Samuel Peck, G. Ralph Laighton, Chas. G. Sanford and Russell Frost, and said receiver delivered possession of said property to said purchasers, which said last mentioned deed was on the — day of May A. D. 1905 recorded in the Recorder's Office of Madison County in the State of Illinois in book 311 page 162, as by a certified copy of said deed and of the certificate of record thereof, hereto attached marked "Exhibit A" and made a part hereof, will more fully appear.

Your orator further represents that afterwards on or about the thirtieth day of March A. D. 1906, your orator purchased all of said property so sold as aforesaid from said Samuel Peck, G. Ralph Laighton, Chas. G. Sanford and Russell Frost and received from them a deed dated the day and year last aforesaid, conveying said property to your orator, which said deed is recorded in the
13 Recorder's Office in Madison County aforesaid in book 328 page 477, and your orator ever since the date of said deed

has been and is now the sole owner and in possession of said property and your orator attaches hereto and makes part of this bill of complaint a copy of its said deed, marked "Exhibit B," and stands ready to produce said deed on the hearing hereof.

Your orator further represents that on or about the Tenth day of June A. D. 1907 Allen A. Brown, trustee, Robert B. Wason, Harriet W. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Chas. M. Page, Geo. W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask and Mary A. Evans by James Hamilton Lewis their solicitor and Elijah N. Zoline, of counsel, filed their certain bill of complaint in the Circuit Court of Madison County in the State of Illinois against the Boston Water and Light Company, the International Trust Company, Geo. W. Sumner and Chester B. Sumner, executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice G. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, Geo. F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., Cidele Venner, Samuel Peck, G. Ralph Laighton, Chas. G. Sanford, Russell Frost, your orator and unknown parties, praying for the foreclosure of the aforesaid mortgage made by the Boston Water and Light Company to the International Trust Company and the appointment of a receiver for the property mentioned and described therein and process from said Circuit Court of Madison County has been issued and served upon your orator to appear and answer to said bill.

Your Orator further represents that said mortgage deed from said Boston Water and Light Company to said International Trust Company is set out in full in said last mentioned bill of complaint and in and by said bill of complaint so filed in said Circuit Court of Madison County, it is alleged that the complainants therein and the other defendants hereinafter named, (excepting said James Hamilton Lewis and Elijah N. Zoline) for full consideration and in open market, became possessed of one hundred and twenty-five thousand dollars ($125000.00) of bonds secured by said mortgage trust deed made by the Boston Water and Light Company to said International Trust Company as aforesaid, and that said complainants and other holders of the bonds described in said trust deed are the only real parties in interest other than said Boston Water and Light
14 Company having any valid claim to the property created and owned by said Boston Water and Light Company of Alton, and Upper Alton in the State of Illinois and mortgaged or intended to be by said trust deed, and that said bonds together with interest thereon remain wholly unpaid and unsatisfied, and because of the default in the payment of interest on said bonds said complainants have elected to declare the whole amount due upon said bonds together with interest and charges thereon to be payable immediately; and that in the said trust deed and agreement between the International Trust Company and the Boston Water and Light Company and particularly under Paragraph 12, it was specifically provided that the said trustee, the International Trust Company, should be under no obligation to defend any suit or proceeding

brought against it, as trustee until indemnified to its satisfaction for so doing, but that it might appear and defend the same without indemnity if it should elect so to do and in such case it should be compensated therefor from the trust fund; but further that the said trust deeds specifically provided in paragraph 24, that the said trustee should have no duty or responsibility of the said trust deed or the things therein contained for the security thereby afforded, nor unless said trustee is called upon to take active measures to enforce the security by foreclosure is it to seek indemnity and that it was specifically provided in said Paragraph 24 that prior to the said trust company being called upon to foreclose the security its sole duty is confined to certifying the aforesaid bonds as of the series mentioned; and that they, the said complainants and each of them, have duly demanded of the International Trust Company that the said Trust Company foreclose the said mortgage upon the property therein referred to for and in behalf of said complainants but that the said Trust Company for reasons satisfactory to itself declined to take such action and that said complainants are informed that the said Trust Company is not by law called upon to do anything further or other than that which has been done heretofore by it looking towards collection of the interest upon the said bonds and therefore the said Trust Company declined to take action looking to the foreclosure of the said mortgage and trust deed in behalf of and for said complainants; that there has been default in the payment of the said interest upon all the bonds described in said mortgage or trust deed for the years 1902, 1903, 1904 and 1905 and it
15 therefore becomes necessary for said complainants to seek relief in a Court of Equity and seek the foreclosure of said trust deed and such other proceedings as shall be necessary to applying the said property named in the said deed of trust, the proceeds thereof, to the payment of the bonds and claims of said complainants; and that it is meet and advisable that the said property described in the said trust deed be at once seized and taken possession of by said Circuit Court of Madison County to the end that the incomes, rents and issues be conserved and that a receiver or other custodian be named by the court to take charge of the said property and conserve its issues, rents and profits pending the controversy over the same and pending the foreclosure of the said trust deed for and in behalf of said complainants and that it is meet and appropriate in equity that the said property be adjudged the property of the said Boston Water and Light Company duly pledged to the International Trust Company for the security of said complainants and other holders of said bonds situated as they are and that the said property be brought into court by due process and adjudged to be the security for the bonds owned by said complainants and others and that the said trust deed be foreclosed and that, after due hearing of the parties herein, an order of sale of said property be made ordering the said property to be sold in order that the proceeds from the same shall be applied to the paymnet of the complainants as bondholders and of such persons as may be similarly situated as they are; and that Samuel Peck, G. Ralph Laighton, Chas. G. Sanford, Russell Frost and some un-

known parties have or claim to have some interest in the said mortgaged premises or some part thereof as purchasers, mortgagees, judgment creditors or otherewise, which interests, if any, have accrued subsequent to the lien of the said mortgage of complainants and are subject thereto, as by a copy of which said bill of complaint hereto attached marked "Exhibit C", and made a part hereof, will more fully appear.

Your Orator further represents that your orator is informed and believes and therefore states the fact to be, that said bill of complaint was so filed in said Circuit Court of said County of Madison in collusion with the said George W. Sumner and Chester B. Sumner executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon
16 Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, who are named as defendants in said bill and alleged therein to be the holders of a part of said bonds of the Boston Water and Light Company and that said defendants so named pretend to claim the same right as set up by said complainants to foreclose said mortgage or deed of trust made by said Boston Water and Light Company as aforesaid regardless of said decree of this Honorable Court in the consolidated causes aforesaid.

Your Orator further represents that none of the defendants hereinafter named are inhabitants of the Southern District of Illinois or can be found therein; that said Allen A. Brown, resides at the City of Boston in the State of Massachusetts, that said Robert B. Wason, resides at the City of Cambridge in the State of Massachusetts; that Harriet N. Houghton resides at the City of Brookline in the State of Massachusetts; that James Schoulder, C. A. Damon, M. C. Grier; and Sabra Hodgkins reside at the City of Boston in the State of Massachusetts; that Joseph C. Foster resides at the City of Salem in the State of Massachusetts; that Charles M. Page resides at the City of Albany in the State of New York; that Geo. W. Fairbank resides at the town or City of Cochituate in the State of Massachusetts; that Wm. B. Trask resides at the City of Erie in the State of Pennsylvania; that Mary A. Evans resides at the City of New York in the State of New York; that said Geo. W. Sumner and Chester B. Sumner reside at the City of Belfast in the State of Maine; that said James Howe resides at the City of Boston in the State of Massachusetts; that said Orrin Warren resides at the town of West Newbury in the State of Massachusetts; that said Alice G. Page resides at the City of Philadelphia in the State of Pennsylvania; that said John Farquhar resides at the City of Boston in the State of Massachusetts; that said George F. Lovett resides at the City of Melrose in the State of Massachusetts; that said Vernon Prouty resides at the City of Spencer in the State of Massachusetts; that said Frank Drumgoole resides at the town of Mt. Kisco in the State of New York; that said Cidele Venner resides at the City of New York in the State of New York and that said C. H. Venner Co., is a corporation organized under the laws of New Jersey with its office in Boston, Massachusetts.

and that said James Hamilton Lewis and Elijah N. Zoline reside at the City of Chicago in the State of Illinois.

17 Your Orator further represents that the said bill of complaint so filed in the Circuit Court of Madison County aforesaid is an attempt on the part of the complainants therein to relitigate in said Circuit Court the questions of right concerning said property which had been fully litigated and settled in this Honorable Court by the decree aforesaid, made by this Honorable Court in the consolidated causes hereinbefore mentioned, and to render ineffectual the said decree and the sale and deed made in pursuance thereof and is a cloud upon your orator's title to said property which tends to depreciate your orator's said title and interfere with a sale of said premises by your orator.

For as much therefore as your orator is without adequate remedy for its protection as grantee of the said purchasers under said sale and decree save by application to this Honorable Court to remove said cloud upon your orator's said title and enjoin the said complainants in said suit in said Circuit Court of Madison County aforesaid, and the said James Hamilton Lewis and Elijah N. Zoline their solicitor and counsel respectively, and their other attorneys, solicitors, and agents from the further prosecution of said suit and to enjoin said complainants and the other defendants hereinafter named from beginning any other suit for the foreclosure of said mortgage or deed of trust made by said Boston Water and Light Company to said International Trust Company and your orator therefore asks the aid of this Honorable Court in the premises and makes the said Allen A. Brown, trustee, Robert B. Wason, Harriet N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Chas. N. Page, Geo. W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice G. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner parties defendant to this bill and prays that they may be required to answer this your orator's bill according to the rules and practice of this Honorable Court without oath, their answer on oath being hereby waived, and that until a final hearing herein or until the further order of this Honorable Court the said defendants, who are complainants in said suit in the Circuit Court of Madison County in the State of Illinois and

18 said James Hamilton Lewis and Elijah N. Zoline their solicitor and counsel respectively and all others, their solicitors, attorneys and agents may be enjoined from further prosecuting the said suit and that they and the other defendants herein named, their solicitors, attorneys and agents may be enjoined from beginning any other suit for the foreclosure of said mortgage or deed of trust made by said Boston Water and Light Company to said International Trust Company, and that upon said final hearing said injunction may be made perpetual, that such of said defendants as are complainants in said suit and their said solicitor and counsel therein

may be required to dismiss said suit now pending in said Circuit Court of Madison County as a cloud upon your orator's title; and that your orator may have such other and further relief in the premises as to your honors shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill but also a writ of subpœna of the United States of America, or such notice as your honors may order, directed to the said Allen A. Brown, trustee, Robert B. Wason, Harriet N. Houghton, James Schoulder, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice G. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, personally to be and appear before this Honorable Court at a certain time and under a certain penalty therein to be limited then and there to answer fully the premises and further to stand to perform and abide such further order and decree herein as to your honors may seem meet.

ALTON WATER COMPANY,
By LEVI DAVIS, *Its Solicitor.*

LEVI DAVIS,
*Solicitor & Counsel for Complainant.*

19 UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

On this 13th day of July A. D. 1907 before me personally appeared Charles A. Caldwell the treasurer of the Alton Water Company the complainant above named, *on* being by me duty sworn deposes and says that he is the treasurer of the Alton Water Company and familiar with its business and that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and *believed* and as to these matters he believes them to be true.

CHARLES A. CALDWELL, *Treasurer.*

Subscribed and sworn to before me this 13th day of July A. D. 1907.

L. M. CARR,
[L. S.] *Notary Public.*

(Indorsed:) Filed July 13, 1907 James T. Jones Clerk.

20 EXHIBIT A.

*Exhibit A to Bill.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Southern District of Illinois.

THE FARMER'S LOAN AND TRUST COMPANY, Trustee,
vs.
THE NEW ENGLAND WATER WORKS COMPANY, THE ALTON WATER Works Company, American Loan & Trust Company, Trustee; The United Water Works Company, The Boston Water & Light Company, The International Trust Company, Trustee; Charles A. Caldwell, Trustee, and Anson M. Lyman, Trustee.

Bill of Foreclosure. Mortgage.

Consolidated with

THE UNITED WATER COMPANY, LIMITED,
vs.
THE NEW ENGLAND WATER WORKS COMPANY, THE ALTON WATER Works Company, The Farmer's Loan*d* & Trust Company, The American Loan & Trust Company, Charles A. Caldwell, Trustee, and Anson M. Lyman, Trustee.

Creditor's Bill.

At a session of said court held at the Federal Court Room in the City of Springfield, Illinois, on the 6th day of May, 1905, present, the Hon. J. Otis Humphrey, Judge; in this cause Walter McClellan Allen, Esq., one of the Masters in Chancery of said court, presented to said court a deed for the property sold by him and reported sold to Samuel L. Peck, G. Laighton, Charles G. Sanford and Russell Frost, as a committee, etc., in his report on the 19th day of April 1905, and at the same time presented a certificate under the hand of the Clerk and register of said court, certifying that the said purchaser
21 has in pursuance of the order or decree of said court entered herein on the 5th day of May, 1905, paid the purchase price bid by them for the property so sold in full. And thereupon the court having examined said deed so presented by the said Master, it is ordered, adjudged and decreed that the said deed is in all respects proper, and is hereby approved, and said Master is hereby ordered and instructed forthwith to execute the same, and deliver the same to the said purchasers.

And it is further ordered, adjudged and decreed that a certified copy of this order may be attached to said deed and recorded therewith in the records of conveyances of Madison County, Illinois.

Circuit Court of the United States, Southern District of Illinois, ss:

*I*, James T. Jones, Clerk of the Circuit Court of the United States in and for the Southern District of Illinois, do hereby certify that the foregoing is a true copy of an order by court this day entered in a certain cause wherein The Farmer's Loan & Trust Company, Trustee, is complainant and the New England Water Works Company et al. are defendants, as the same appears of record in my office.

In testimony whereof, I hereto subscribe my name and affix the seal of said court at Springfield, Illinois, in said District, this 6th day of May, in the year of our Lord one thousand nine hundred and five.

[COURT SEAL.] JAMES T. JONES, *Clerk*.

This Indenture, Made this sixth day of May, A. D. 1905, between Walter McClellan Allen of the City of Springfield, County of Sangamon and State of Illinois, as Master in Chancery of the Circuit Court of the United States for the Southern District of Illinois, party of the first part, and Samuel L. Peck of Warren, Rhode Island, G. Ralph Laighton, of Portsmouth, New Hampshire, Charles G. Sanford, of Bridgeport, Connecticut and Russell Frost of South Norwalk, Connecticut, as a committee representing the holders of all outstanding bonds secured by deed of trust to Charles A. Cadwell, Trustee, and of bonds secured by deed of trust to the Farmer's Loan & Trust Company, Trustee, who have deposited their bonds with the
22 Farmer's Loan & Trust Company subject to the order of said Committee, parties of the second part, witnesseth:

Whereas, in pursuance of a certain decree entered on the 23rd day of December, A. D. 1903, by the said court in a certain case then pending therein wherein the Farmer's Loan & Trust Company, Trustee, is complainant and the New England Water Works Company, The Alton Water Works Company, The American Loan & Trust Company, Trustee, The United Water Works Company, Boston Water & Light Company, The International Trust Company, Trustee, Charles A. Cadwell, Trustee and Anson M. Lyman, Trustee, are defendants, consolidated with a certain other cause then pending in said court wherein The United Water Works Company is complainant and the New England Water Works Company, The Alton Water Works Company, The Farmer's Loan & Trust Company, Trustee, The American Loan & Trust Company, Trustee, Anson M. Lyman, Trustee, and Charles A. Cadwell, Trustee, are defendants, the said Master in Chancery duly advertised according to law and the decrees, the premises hereinafter described for sale at public auction to the highest and best bidder, upon the terms and conditions prescribed by said decree at the hour of 11 o'clock in the forenoon of Tuesday the 18th day of April, A. D. 1905, at the north floor of the Court House of the County of Madison, in the State of Illinois, in the City of Edwardsville, in the Southern District of Illinois.

And whereas, at the time and place so as aforesaid appointed for said sale, the said Master in Chancery attended to make the same and offered said premises for sale at public auction, to the highest and best bidder upon the terms and conditions aforesaid, and there-

upon the parties of the second part, Samuel L. Peck, G. Ralph Laighton, Charles G. Sanford, and Russell Frost, as such committee, offered and bid therefor the sum of two hundred and twenty thousand ($220,000.00) Dollars, and that being the highest and best bid offered said Master in Chancery accordingly struck off and sold to said parties of the second part, Samuel L. Peck, G. Ralph Laighton, Charles G. Sanford, and Russell Frost, committee as aforesaid, for said sum of money, the said premises.

Which said sale having been duly reported to this court by said Master in Chancery, was after due notice to all parties, confirmed and the said Master in Chancery order- to make
23 a deed to the purchasers upon the completion of the payment of the purchase price aforesaid, according to the terms of said decree, and the said purchase price having been fully paid according to the terms of said decree by my purchasers.

Now Therefore, the said party of the first part, in consideration of the premises and in order to carry into effect the said sale so made as aforesaid, and in consideration of the said sum of Two hundred and twenty thousand ($220,000.00) Dollars, paid by the parties of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell alien release and confirm unto the parties of the second part and to their successors and assigns, forever, all the following lands, property, rights, interest and feanchises viz: All the water works property, plant and system in the City of Alton, and Village of Upper Alton, in said Madison County, now or lately owned or operated by The New England Water Works Company, including the water works property connected and operated therewith and owned and claimed to be owned by the Boston Water & Light Company, together with all rights and franchises connected therewith and thereto appertaining, all of which property is more particularly described as follows:

(a) A tract of land lying in the City of Alton, in Madison County, Illinois, bounded as follows: Beginning at a stone in the east line of State street, where the southe line of the northwest quarter of section eleven (11) in township five (5) range ten (10) west of the third principal meridan crosses State Street; thence east along said quarter section line four hundred and forty nine and eight tenths (449.8) feet to a stone; thence north to a point where a line running along and with the southwest end of lot thirteen (13) in Block One (1) in Hawley's Addition to Alton shall intersect the same; thence along said last mentioned line and lot thirteen (13) to the southeast side of Vine Street, as designated on the plat of Hawley's Addition; thence southwardly along said Vine Street to a point where a line crossing said Vine Street at right angles will strike the southeast corner of lot eighteen (18) in Semple's Addition to Alton, thence along the south line of said lot eighteen (18) one hundred and twenty five (125) to a stone on the line of State

Street; thence southwardly along the line of said State Street
24 two hundred and seventy eight (278) feet and six (6) inches
to a stone set in the angle of State Street; thence southwardly along the line of State Street two hundred and ninety-seven (297) feet to the place of beginning; upon which land is built a reservoir used in operating the water works; excepting however, from said premises a small piece of land in the southwest corner of the same fronting about sixty feet on State Street which has been sold to William Hope, who has erected on the same a two story brick house.

(*b*) Also a lot of land situated in the City of Alton in said Madison County described as follows: A certain tract of land in the northwest part of the south fractional half of section ten (10) in township five (5) North in range ten (10) west of the third principal meridian in said Madison County, being part of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong by deed dated July 15, 1891, and recorded in the recorder's office of said Madison County in Book 205 of records at page 203, and further described as beginning at the point of intersection of a line with low water marks of the Mississippi River which point of intersection is forty (40) feet northwesterly from the easterly and southeasterly line of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong as aforesaid; thence in a northeasterly direction two hundred (200) feet more or less to intersect the center line of the county road in said south fractional half of said section ten (10) so as to form at said intersection a right angle with said center line of said county road; thence north fifty seven degrees (57) west along said center line three hundred feet to a point; thence southwesterly and at right angles to said center line of said road two hundred (200) feet more or less to the Mississippi River, then easterly down the Mississippi River, three hundred (300) feet to the place of beginning, including the land to the center thread of said river; together with the right to lay water mains across other lands belonging to Katherine Armstrong from the power plant and pumping works on the property described to the reservoir and standpipes and the right and easement to enter upon and make the necessary excavations and lay and maintain not more than three lines of water mains or water supply pipes through and across the remainder of the land so conveyed as aforesaid by Mary J. Armstrong and husband to Katherine Armstrong by said deed;
25 said lines of pipe to run from said power plant and pumping works in a northeasterly direction across the remainder of said land so conveyed by said Mary J. Armstrong and husband to Katherine Armstrong in parallel courses and not more than ten feet apart, the exact location of said lines of pipe to be left to the parties laying and owning the same;

(*c*) Also all the buildings, pumping works, power plant, filters, reservoirs, stand pipes, water mains and all other improvements, machinery, appliances, tools and other property upon said above described real estate or in any way used in connection with the said water works plant and all the water mains, hydrants, valves, pipes

and other appliances, connected with and which receive water from said power plant, and water system, laid upon or in any of the streets or other parts of the city of Alton and the Village of Upper Alton, in said Madison County, and including all other pipes, machinery appliances and property in any way connected with or used in the operation of said system of water works both those existing when a receiver was appointed in said cause and also those added by said receiver.

(*d*) Also all privileges, franchises, easements, choses in action, estate property, real and personal, effects and assets which the Alton Water Works Company or the New England Water Works Company now has or at any time has had for the construction and operation of said water works plant;

(*e*) Also the franchise or privilege obtained in the name of the Boston Water and Light Company, for laying and operating in Upper Alton the water main and water works connected with and drawing water from the system of water works hereinbefore described;

(*f*) Also all rents, dues, demands and choses in action of every kind and nature, including water rents from Alton, Upper Alton and Private consumers arising from said water works system, with the right to collect the same.

(*g*) Also all moneys and other assets not hereinbefore described which shall be in the hands of the receiver on the date when the property sold hereunder shall be turned over to the purchaser thereof, subject however, to an obligation on the part of such purchaser to pay all the indebtedness and perform all the obligations of said receivership.

To have and to hold the same with all appurtenances thereunto belonging, unto the said parties of the second part, their successors and assigns forever.

In witness whereof, the said party of the first part has
26 hereunto set his hand and seal the day and year first above written.

[SEAL.] WALTER McCLELLAN ALLEN,
*Master in Chancery of the Circuit Court of the United States for the Southern District of Illinois.*

STATE OF ILLINOIS,
*County of Sangamon, ss:*

I, Eva C. Stern, a notary public, in and for the county of Sangamon in the State of Illinois, do hereby certify that Walter McClellan Allen, Master in Chancery of the Circuit Court of the United States for the Southern District of Illinois, personally known to me to be the same person whose name is subscribed to the foregoing instrument and to be such Master, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act as such Master, for the uses and purposes therein set forth.

Given under my hand and official seal this sixth day of May, A. D. 1905.

EVA C. STERN,
*Notary Public.*

[NOTARIAL SEAL.]

Filed for record on the 9th day of May, A. D. 1905, at 8:00 A. M.

STATE OF ILLINOIS,
*County of Madison, ss:*

I, C. H. Kunnemann, Recorder of Deeds, within and for the said county, in the State aforesaid, do hereby certify that the foregoing is a true perfect and complete copy of a certain instrument of writing as the same appears, duly recorded in Book 311 at page 162 of the records of Madison County.

In testimony whereof, I have hereunto set my hand and official seal, this 6th day of July, A. D. 1907.

(Signed) C. H. KUNNEMANN,
*Recorder.*

(Indorsed:) Filed July 13, 1907. James T. Jones, Clerk.

27 EXHIBIT "B."

Exhibit "B" to Bill.

This Indenture Witnesseth: That the grantors, Samuel L. Peck, of Warren, Rhode Island, G. Ralph Laighton, of Portsmouth, New Hampshire, Charles G. Sanford, of Bridgeport, Connecticut, and Russell Frost, of South Norwalk, Connecticut, as a committee, (being the same committee mentioned in a certain deed made to said grantors by Walter McClellan Allen as Master in Chancery of the Circuit Court of the United States for the Southern District of Illinois, bearing date the 6th day of May A. D. 1905, and recorded in the Recorder's Office of Madison County, Illinois, in Book 311 page 162) for and in consideration of the sum of One Dollar ($1.00) in hand paid, and other good and valuable consideration, do by these presents, grant, bargain and sell unto the Alton Water Company (a corporation organized and existing under the laws of the State of Illinois) its successors and assigns, all the following described lands, property, rights, interests and franchises to-wit:

All the water works property, plant and system in the City of Alton and the Village of Upper Alton, in said Madison County, lately owned or operated by the New England Water Works Company, including the water works property connected and operated therewith, and lately owned or claimed to be owned by the Boston Water and Light Company, together with all rights and franchises connected therewith and thereto appertaining, all of which property is more particularly described as follows:

(*a*) A tract of land lying in the City of Alton in Madison County, Illinois, bounded as follows: Beginning at a stone in the east line of State Street, where the south line of the northwest quarter of

section eleven (11) in township five (5) range (10) west of the third principal meridian crosses State street; thence east along said quarter section line four hundred and ninety nine and eight tenths (499.8) feet to a stone; thence north to a point where a line running along and with the southwest end of lot thirteen (13) in Block one (1) in Hawley's Addition to Alton shall intersect the same; thence along said last mentioned line and lot thirteen (13) to the southeast side of Vine Street, as designated on the plat of Hawley's Addition; thence southwardly along said Vine street to a point where a line crossing said Vine street at right angles
28 will strike the southeast corner of lot eighteen (18) in Semple's Addition to Alton; thence along the south line of said lot eighteen (18) one hundred and twenty five (125) feet to a stone in the line of State Street; thence southwardly along the line of said State Street two hundred and seventy-eight (278) feet and six (6) inches to a stone set in the angle of State Street; thence southwardly along the line of State Street two hundred and ninety seven (297) feet to the place of beginning, upon which land are two metallic reservoirs or tanks used in operating the water-works; excepting, however, from said premises a small piece of land in the southwest corner of the same fronting about sixty (60) feet on State street, which has been sold to William Hope, who has erected on the same a two story brock house.

(*b*) Also a lot of land situated in the City of Alton in said Madison County, described as follows:

A certain tract of land in the northwest part of the south fractional half of section ten (10) in township five (5) north, in range ten (10) west of the third principal meridian, in said Madison County, being part of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong by deed dated July 15, 1891, and recorded in the Recorder's Office of said Madison County in Book 205 of records at page 203, and further described as beginning at the point of intersection of a line with low water mark of the Mississippi River, which point of intersection is forty (40) feet northwesterly from the easterly or southeasterly line of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong as aforesaid; thence in a northeasterly direction two hundred (200) feet more or less to intersect the center line of the county road in said south fractional half of said section ten (10) so as to form at said intersection a right angle with said center line of said county road; thence north fifty-seven degrees (57) west along said center line three hundred (300) feet to a point; thence southwesterly and at right angles to said center line of said road two hundred (200) feet more or less to the Mississippi River; thence southeasterly down the Mississippi River three hundred (300) feet to the place of beginning, including the land to the center thread of said river, on which are located the power plant, pumping works, and filters of said Water Works; together with the right and easement to lay and maintain water mains from said power plant and pumping works across other lands belong-
29 ing to Katherine Armstrong and across lands now or lately owned by John E. Hayner and across lands of Henry G.

McPike to the metallic reservoirs or tanks aforesaid and the right and easement to enter upon and make the necessary excavations and lay and maintain not more than three lines of water mains or water supply pipes through and across the remainder of the land so conveyed as aforesaid by Mary Armstrong and husband to Katherine Armstrong by said deed; said lines of pipe to run from said power plant and pumping works in a northeasterly direction across the remainder of said land so conveyed by said Mary J. Armstrong and husband to Katherine Armstrong in parallel courses and not more than ten (10) feet apart, the exact location of said lines of pipe to be left to the parties laying and owning the same;

(*c*) Also all the buildings, pumping works, power plant, filters, reservoirs, stand pipes, water mains, and all other improvements, machinery, appliances, tools and other property upon said *a* above described real estate or upon or across any of the lands above mentioned or in any way used in connection with the said water works plant and all the water mains, hydrants, valves, pipes, and other appliances, connected with and which receive water from said power plant and water works system, laid upon or in any of the streets or other parts of the City of Alton and the Village of Upper Alton in said Madison County, and including all other pipes, machinery, appliances and property in any way connected with or used in the operation of said system of water-works.

(*d*) Also all privileges, franchises and easements for the construction and operation of said water works plant, conveyed to said grantors by said deed made to them by said Walter McClellan Allen, Master in Chancery as aforesaid, including the franchise or privilege obtained in the name of the Boston Water and Light Company for laying and operating in Upper Alton the water mains and water works connected with and drawing water from the system of water works hereinbefore described.

(*e*) Also all other rights, privileges, franchises, rights of way, leases and other property belonging or appertaining to said system of water works, and all tools, implements, supplies, furniture books and other personal property belonging thereto, as the same was conveyed to said grantors by said Walter McClellan Allen, Master in Chancery, by deed as aforesaid, excepting therefrom the moneys and choses in action specified in paragraphs "F" and "G" of said deed, and all materials thereby conveyed, since used and consumed, but including, however, all personal property and supplies now on hand and all moneys received for rentals for water since the first day of January, 1906, and all uncollected water rents and dues from Alton, Upper Alton and private consumers arising from said waterworks system since said last mentioned date, with the right to collect the same, the said grantee, (Alton Water Company) having assumed, and by acceptance hereof assuming, to pay all liabilities of said grantors arising or accruing from the operation and maintenance of said water works plant and system from and after the first day of January, 1906.

And the said grantors, for themselves and their heirs, executors and administrators, do hereby covenant, promise and agree to and

with the said Alton Water Company, its successors and assigns that they, the said grantors, have done nothing and suffered nothing to be done whereby the title to the premises conveyed to them by the said Master in Chancery as aforesaid has been or may be in any way impeached or impaired; that the said premises against the claim of all persons, claiming or to claim by, through or under them or either or any of them only, they will forever warrant and defend.

And the said grantors individually and personally, and Esther Alice Peck, wife of said Samuel L. Peck, May S. Laighton, wife of said G. Ralph Laighton, Emily L. Sanford, wife of said Charles G. Sanford and Augusta E. Frost, wife of said Russell Frost, do hereby convey and quit-claim to said Alton Water Company, its successors and assigns all interest in the premises and property aforesaid intended to be conveyed by this deed.

In Witness Whereof the said grantors and their said wives have hereunto set their hands and seals this 30th day of March, A. D. 1906.

(Signed) SAMUEL L. PECK. [SEAL.]
ESTHER ALICE PECK. "
G. RALPH LAIGHTON. "
MAY S. LAIGHTON. "
CHARLES G. SANFORD. "
EMILY L. SANFORD. "
RUSSELL FROST. "
AUGUSTA E. FROST. "

31 STATE OF RHODE ISLAND,
*County of Bristol, ss:*

I, Charles B. Mason, a notary public in and for the said County in the State aforesaid, do hereby certify that Samuel L. Peck and Esther Alice Peck, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 9th day of May, A. D. 1906.

(Signed) CHARLES B. MASON,
[L. S] *Notary Public.*

STATE OF CONNECTICUT,
*County of Fairfield, ss:*

I, Wm. A. Griffen, Jr., a notary public in and for the said County in the State aforesaid, do hereby certify that Charles G. Sanford and Emily L. Sanford, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as

their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 8th day of May, A. D. 1906.

[L. S.] WM. A. GRIFFEN, JR.
*Notary Public.*

32 STATE OF CONNECTICUT,
*County of Fairfield, ss:*

I, Wm. A. Griffen, Jr., a notary public in and for the said county in the State aforesaid, do hereby certify that Russell Frost and Augusta E. Frost, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged, that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 7th day of May, A. D. 1906.

(Signed) WM. A. GRIFFEN, JR.,
[L. S.] *Notary Public.*

STATE OF NEW HAMPSHIRE,
*County of Rockingham, ss:*

I, Thomas H. Simes, a notary public in and for the said County in the State aforesaid, do hereby certify that G. Ralph Laighton and May S. Laighton, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this tenth day of May, A. D. 1906.

[L. S.] THOMAS H. SIMES,
*Notary Public.*

(Indorsed:) Filed July 13, 1907. James T. Jones, Clerk.

33 EXHIBIT "C."

*Exhibit C.*

STATE OF ILLINOIS,
*County of Madison, ss:*

In the Circuit Court of Madison County.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Chas. M. Page, George F. Fairbanks, M. C. Grier, Sabra Hodgkins, Wm. B. Trask and Mary A. Evans, Complainants,

vs.

BOSTON WATER AND LIGHT COMPANY, a Corporation; INTERNATIONAL Trust Company, a Corporation; The Alton Water Works Company, a Corporation; George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner; James Howe, Orrin Warren, Alice G. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, The C. H. Venner Co., a Corporation; Cidele Venner, Samuel Peck, G. Ralph Leighton, Charles G. Sanford, Russell Frost, The Alton Water Company, a Corporation; Illinois State Trust Company, a Corporation, and Unknown Parties, Claiming an Interest in the Property Hereafter Described, Defendants.

Bill to Foreclose, etc.

To the Honorable Judge of Said Court, in Chancery Sitting:

Comes now Allen A. Brown, who alleges to the Court that during all the times hereinafter named, he was and now is a citizen of the State of Massachusetts in said State; and Robert B. Wason,
34 that he was and now is a citizen and resident of the State of Massachusetts, and residing at the City of Cambridge, in said State; and Harriet N. Houghton, that she was and now is a citizen and resident of the State of Massachusetts, and residing at the Town of Brookline in said State; and James Schouler, that he was and now is a citizen and resident of the State of Massachusetts, and residing at the city of Boston in said State; and C. A. Damon, that he was and now is a citizen and resident of the State of Massachusetts, and residing at the city of Boston in said State; and Joseph C. Foster, that he was and now is a citizen and resident of the State of Massachusetts, and residing at the City of Salem in said State; and Chas. M. Page, that he was and now is a citizen and resident of the State of New York, and residing at the city of Albany in said State; and Geo. W. Fairbank, that he was and now is a citizen and resident of the State of Massachusetts, and residing at the town of Cochituate in said State; and M. C. Grier, that he was and now is a citizen and resident of the State of Massachusetts, and residing at the city of

Boston in said State; and Sabra Hodgkins, that she was and no
is a citizen and resident of the State of Massachusetts and residin
at the city of Boston in said State; and Wm. B. Trask, that he w
and now is a citizen and resident of the State of Pennsylvania, an
residing at the city of Erie in said State; and Mary A. Evans, tha
she was and now is a citizen and resident of the State of New Yor
and residing at the city of New York in said State; and your co
plainants, and each and all of them, allege that they are not citize
of the State of Illinois nor residents therein.

And your orators and oratrices respectfully complaining of th
defendants and respondents, here and now showeth and allege th
during all the times hereinafter named the defendants George W
and Chester B. Sumner, Executors of the Estate of William H. Sum
ner, deceased, late a citizen and resident of the State of Maine, an
residing at the city of Belfast in said State; that James Howe w
and now is a citizen and resident of the State of Massachusetts, an
residing at the city of Boston in said State —; and Orin Warren w
and now is a citizen and resident of the State of Massachusetts, an
residing at the Town of West Newbury in said State; and Alice
Page was and now is a citizen and resident of the State of Penns
vania, and residing at the city of Philadelphia in said State; an
John Farquhar, Administrator of the Estate of Benjamin
35 Dudley, deceased, (late a citizen and resident of the State
Massachusetts, and residing at the time of his death in t
city of Boston in said State), was and now is a citizen and resident
the State of Massachusetts, and residing at the city of Boston in sa
State; and Geo. F. Lovett was and now is a citizen and resident
the State of Massachusetts, and residing at the city of Melrose
said State; and Vernon Prouty, was and now is a citizen and resid
of the State of Massachusetts and residing at the city of Spencer
said State; and Frank Drumgoole was and now is a citizen and r
dent of the State of New York and residing at the Town of
Kisco in said State; and the Boston Water and Light Company
a corporation duly organized and existing under the laws of
State of Maine; and the international Trust Company is a corpo
tion organized and existing under the laws of the State of Mas
chusetts; and The C. H. Venner Co. is a corporation organized a
existing under the laws of the State of New Jersey; and Cidele V
ner is a citizen and resident of the State of New York and resid
at the city of New York in said State; and the Alton Water Wo
Company is a corporation duly organized and created under
by virtue of the laws of the State of Illinois, and is a citizen of
State of Illinois, having its principal place of business in the city
Alton, County of Madison, in said State; and Samuel L. Peck
and now is a citizen and resident of the State of Rhode Island
residing at the city of Warren in said State; and G. Ralph Leigh
was and now is a citizen and resident of the State of New Hamps
and residing at the city of Portsmouth in said State; and Chas
Sanford was and now is a citizen and resident of the State of C
necticut and residing at the city of Bridgeport in said State;
Russell Frost was and now is a citizen and resident of the Stat

Connecticut and residing at the City of South Norwalk, in said State; that the Alton Water Company is a corporation doing business in the State of Illinois, that the Illinois State Trust Company is doing business in the State of Illinois, and is a corporation; that all of the said complainants, jointly and together, represent claims and interest thereon against the property hereinafter described securing certain bonds, as will hereinafter by this bill appear.

And your orators and oratrixes further most respectfully show to the court that the defendant, Boston Water and Light Company, in the year 1897 and in the month of October, was engaged in
36 the business of a water company furnishing water and light, and having property in excess of one hundred and twenty-five thousand dollars, towit; and for valuable consideration became by proper title and transfer the owner of all the property, real and personal, described in the indenture herein recited, existing between the Boston Water and Light Company and the International Trust Company, trustee, and thereafter did duly erect the plant of water works and pumps and mains described in said indenture, and under appropriate franchises secured, did proceed to furnish water to the city and village of Upper Alton. That the property so acquired and created by the Boston Water and Light Company, and fully enumerated and described and the deed of trust to said International Trust Company, (which is hereinafter set out verbatim) was acquired and created solely out of the proceeds of the bonds secured by the deed of trust to said International Trust Company, and in no other manner, directly or indirectly, and that your orators and oratrixes and other parties, who are holders of said bonds secured by said deed of trust purchased them for the sole purpose of furnishing the means whereby the said Boston Water and Light Company might acquire, construct and create the said property.

That the International Trust Company herein referred to was a trust company on and at the said date the first day of October, 1897, having principally for its business banking and the acting as trustee in matters of mortgage and other securities, and particularly as trustee for bond issues, circulated and existing under mortgages, and acting as the registrar of the same, and particularly acting as registrar and agent and trustee for bondholders who may become owners of bonds under and by virtue of any mortgage held, controlled, or supervised in any form by the said International Trust Company.

And your orators and oratrixes allege that the said Boston Water and Light Company, for valuable consideration, towit: the said Company did on the first day of October, 1897, duly make, execute and deliver its certain indenture to the said International Trust Company, defendant herein referred to, which said indenture was a deed of trust of the said Boston Water and Light Company to the said International Trust Company for the purpose of securing certain bonds, which said bonds are described in the said indenture, and
37 the proceedings and the matters therein contained, are in the words and figures following, towit:

This indenture made this First day of October, A. D. 1897, by

and between the Boston Water and Light Company, a corporation organized and existing pursuant to the laws of the State of Maine, party of the first part, and the International Trust Company, a corporation organized and existing under the laws of the State of Massachusetts, and having its principal office in the City of Boston, Massachusetts, as Trustee, party of the second part, witnesseth:—

That Whereas, said party of the first part is now the owner of certain lands, rights and easements situated in the City of Alton, County of Madison and State of Illinois, as hereinafter in this instrument more fully described, and is now proceeding with the construction on said lands of a pumping-station and filter-plant, and the laying of certain lines of pipe through various streets and private property in said City for the purpose of furnishing water to the New England Water Works Company, a corporation owning a franchise to supply water to said City of Alton and the inhabitants thereof for fire, domestic and other purposes, and said party of the first part expects within a short time to extend its pipe lines throughout the Village of Upper Alton, Illinois, to supply said Village and the inhabitants thereof with water for municipal and domestic purposes.

And Whereas, it is necessary for the said party of the first part to borrow money for the purpose aforesaid, and also for the purpose of paying for any extension, enlargements or betterments made, and for any real or personal property which may be acquired by said party of the first part for use in connection with its property at or near the City of Alton, Illinois, subsequent to the First day of January, 1898.

And Whereas, the said party of the first part desires to issue its bonds for the purposes aforesaid, and to secure the payment of the same by mortgage or deed of trust, and is by Law authorized by and through the action of its Board of Directors to borrow money and to secure the payment of bonds issued therefor by mortgage on its property.

And Whereas, the Board of Directors of said party of the first part at a regular meeting thereof, held at the office of said corporation, in the City of Boston, Massachusetts, on the 29th day
38 of September, A. D. 1897, unanimously adopted the following resolution, viz:—

Resolved, That this Company make and execute Two Hundred (200) bonds of the denomination of One Thousand ($1000) Dollars, each, bearing date October first, 1897, payable October first, 1917, with interest thereon at the rate of Five per cent, per annum, payable semi-annually on the first days of April and October of each year. Both principal and interest being payable in United States Gold coin of the present standard of weight and fineness.

Resolved: That to secure the payment of said Two Hundred (200) bonds, or such of them as shall at any time be outstanding and unpaid, together with interest thereon at the time, in the manner and at the place in said bonds specified, this Company the said Boston Water and Light Company, make, execute and deliver to the said International Trust Company of the City of Boston, Massachusetts, as Trustee, a mortgage or deed of trust of all its property real and

personal, its rights privileges, easements, franchises, choses in action, and assets of every kind and description now owned or which it may at any time hereafter acquire, at and near the City of Alton, State of Illinois, and which are used or appurtenant in any way to the water works now being constructed by said party of the first part at the said City of Alton.

Resolved: That the President and Treasurer be, and they hereby are directed, to procure said bonds and mortgage or deed of trust to be drawn with such terms, conditions, stipulations, covenants, and agreements as shall to them seem best, and the said President and Treasurer are hereby authorized to make, execute and deliver the said bonds and the said mortgage or deed of trust to the Trustee, the said bonds to be delivered by said Trustee pursuant to the provisions contained in the mortgage or deed of trust securing the same.

And Whereas, in pursuance of the said resolutions, this Company has made, executed and delivered its Two Hundred (200) negotiable bonds for the sum of One Thousand ($1000) Dollars each, of the form, tenor and effect following, that is to say.

39 EXHIBIT "C."

United States of America.

No. —.

$1000.00. $1000.00.

Boston Water and Light Company First Mortgage 5% Gold Bond Secured upon its Water-Works Plant at Alton, Illinois.

On the first day of October, 1917, for Value Received, the Boston Water and Light Company, a corporation organized and existing pursuant to the laws of the State of Maine, promise to pay to the bearer One Thousand Dollars, with interest thereon at the rate of Five per cent, per annum, payable semi-annually on the First days of April and October in each year on presentation and surrender of the coupons hereto annexed as they respectively become due, both principal and interest being payable in United States Gold coin of the present standard of weight and fineness at the office of said Company in the City of Boston, Massachusetts. The principal of this bond may be registered, and when registered by an officer of the Company shall be payable only to the registered holder, his or their legal representatives or assigns, but the coupons shall remain payable to bearer. This bond is one of a series of 200 of like tenor and effect amounting in the aggregate to the sum of $200,000, issued by the Boston Water and Light Company, and secured by a duly authorized, executed and recorded mortgage or deed of trust, bearing even date herewith, conveying the property of said corporation, real and personal, located in the County of Madison, State of Illinois, in and about the City of Alton, now owned or which may hereafter be acquired, and the income therefrom, to the International Trust Company of the City of Boston, Massachusetts, Trustee.

One hundred of said bonds being bonds numbered from No. 101 to No. 200, both inclusive, have been deposited with the said Trust Company, as Trustee, to be issued from time to time after January, 1898, for the purpose of paying for extensions and betterments, and any real or personal property acquired for use in connection with or as a part of the Company's plant at Alton, Illinois, as in said deed of trust provided. No stockholder, director or officer of said Company shall be individually liable for the amount of this bond or any part thereof, or interest thereon.

This bond shall not be valid or deemed outstanding until the execution by said Trust Company, as Trustee, of the certificate endorsed thereon.

In Witness Whereof, the said Boston Water and Light Company hath caused this negotiable bond to be executed by its President and Treasurer who each covenant that there are duly authorized in its behalf, and its corporate seal to be hereto affixed this First day of October, A. D. 1897.

—— ——,
*President.*

—— ——,
*Treasurer.*

To each of which said bonds are attached Forty (40) coupons of the form, tenor and effect following, viz:

*Coupon.*

$25.00. $25.00.

On April 1st, 1898, the Boston Water and Light Company will pay the bearer Twenty-five dollars in United States Gold coin at its office in the City of Boston, Massachusetts, for six months interest due on its first Mortgage Alton water bond.

No. —.

—— ——,
*Treasurer.*

*Trustee's Certificate.*

This bond is one of the series secured by the within mentioned Trust Mortgage and is entitled to the benefits thereof.

INTERNATIONAL TRUST COMPANY,
*Trustee.*

By —— ——, *Secretary.*

All of which said Two Hundred bonds have been delivered to the International Trust Company for execution by it of the certificate thereon and subject to the following terms, viz:

First. Bonds consecutively numbered from No. 1 to No. 100, both inclusive, shall be delivered by the said International Trust Company on demand, to any person or persons presenting to it a written

order signed by the President and Treasurer of the first part, under the seal of the first party.

Second. Bonds numbered consecutively from No. 101 to No. 200, both inclusive, shall be retained by said International Trust Company, as Trustee, and shall be delivered by it to the order of
41 the President and Treasurer of the first party, under seal, as the same are demanded after January, A. D. 1898, upon the following terms and conditions, viz:—Whenever the Board of Directors of the said first party shall have determined to make any improvements, enlargements or extensions to its work and plant at Alton, Illinois, or to purchase any real or personal property for use in connection with said water plant, and shall present to the said Trustee a statement of the estimated cost of such improvements, enlargements, extensions or real or personal property, verified by the oath of the President or Treasurer of said Company, it shall be the duty of the said Trustee to deliver to the order of the said President and Treasurer, so many of said one hundred bonds then remaining in trust with it under the terms of this clause, as shall be sufficient at the price of ninety to pay the estimated cost of such real and personal property, improvements, enlargements or extensions as the Board of Directors may determine to make or acquire after January A. D. 1898.

Third. While any of the said last mentioned one hundred bonds shall so remain in the custody of the said Trustee they shall not be considered to be outstanding or negotiated, but upon the delivery by the said Trustee, and the endorsement of its certificate thereon, they shall be deemed to be outstanding and negotiated, to be paid with pro rata equality with all other bonds secured by this instrument, which shall be outstanding and negotiated, and entitled to an equal pro rata benefit of all the provisions of this instrument. The said Trustee shall as often as any installment of interest becomes due on said bonds, cut off, deface and cancel the coupons as they respectively become due, upon all of said bonds remaining in its custody under the provisions of this instrument, and the said coupons so cut off, defaced and cancelled deliver to the party of the first part. Whenever any of said bonds so placed in trust as aforesaid, with the said Trustee, shall be issued and delivered on the order of the said first party, the said Trustee shall execute on each of said bonds so delivered, the Trustee's certificate thereon endorsed.

And Whereas, the form of this mortgage was submitted at a regular meeting of the Board of Directors of the first party held on the fourth day of October, A. D. 1897, at which all the Directors of the said Company were present.

And Whereas, after the submission of the same, the said Board of Directors approved of the form and directed the
42 same to be executed on behalf of the first party by its President and Treasurer.

Now, This Indenture Witnesseth: That the said Boston Water and Light Company, the party of the first part, in pursuance of and by the authority of law, and of the proceedings of the Board of Directors aforesaid, to secure the payment of the principal and in-

terest of the above described bonds as hereinafter stated, and in consideration of the premises aforesaid and of the sum of One Dollar to it in hand paid by the said International Trust Company, the said party of the second part, the said Trustee, the receipt whereof is hereby confessed and acknowledged, and for the purpose of securing the payment to the holders of so many of said bonds as shall be at any time outstanding with pro rata equality, principal and interest, hath granted, bargained, sold, released, remised, enfeoffed, confirmed and conveyed, and by these presents doth grant, bargain, sell, release, remise, enfeoff, confirm and convey unto the said party of the second part, its successors and assigns as Trustee, for the uses and purposes, and subject to the conditions and trusts hereinafter expressed, all the privileges, franchises, easements, choses in action, property real and personal, effects and assets, which the said first party now has or may at any time hereafter during the existence of this mortgage acquire, at or near the City of Alton, Illinois, among which are the following, that is to say: All interest in the following described real estate, towit:

A certain tract of land in the Northwest part of the South fractional half of Section Ten (10) in Township 5 North Range 10 West of the 3rd P. M., in the County of Madison and State of Illinois, and being a part of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong by deed dated July 15th, 1891, and recorded in the Recorder's office of said Madison County in Book 211 on page 91. The tract hereby conveyed beginning at the point of intersection of a line with low-water mark of the Mississippi River, which point of intersection is Forty (40) feet Northwesterly from the Easterly or Southeasterly line of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong as aforesaid, thence in a Northeasterly direction two hundred (200) feet more or less to intersect the center line of the County Road in said South fractional half Section Ten (10) Township Five North Range
43 Ten (10) so as to form at said intersection a right angle with the center line of said County Road; thence North Fifty-seven (57) degrees West along the center of said Road Three Hundred (300) feet to a point, thence Southwesterly and at right angles to the center line of said County Road Two Hundred (200) feet more or less to the Mississippi River, thence Southeasterly down the Mississippi River Three Hundred (300) feet to the place of beginning, the intention hereof being to convey to the center thread of said River, the part lying between the center line of said County Road and said low-water mark containing 1 30/100 acres more or less, situated in the City of Alton, in the County of Madison and State of Illinois. The said premises being the same which were conveyed to Truman A. Taylor by Katherine Armstrong by deed dated September 3rd, A. D. 1897, and by Truman A. Taylor and his wife by deed dated October 7, 1897 conveyed to the Boston Water and Light Company. Also all the rights and easements granted by the two last mentioned conveyances to enter and make the necessary excavations and lay and maintain not more than three lines of water-mains or water pipes, through and across the remainder of said land

conveyed to said Katherine Armstrong as aforesaid said lines of pipe to run from the land hereby conveyed in a Northeasterly direction across said remainder in parallel course and not more than ten feet apart, the exact location of said lines being left to the party of the first part, its successors or assigns. Also all its interest in and title to the pumping station and other buildings on the premises above described, together with the engines, boilers, pumps and other machinery and fixtures on said premises, or in any way connected therewith, and all water-mains, service pipes, fire-plugs, tanks and other appliances for the distribution and use of water, owned by said party of the first part at or near said City of Alton, including tools, implements, supplies and movable property of whatever kind pertaining to said water-plant, and this mortgage is intended to cover and include any and all other pipes of any name, nature or description now used, or which may hereafter be used or laid in extending said water-works, and also all the franchises, and rights which it now has, or may hereafter at any time acquire, in connection with and for the operation of said water-plant, and also all the rents, dues, demands and choses in action of every kind and nature under and by virtue of any contract between the said first party, the New England
44 Water Works Company, the City of Alton, or any other corporation or person in connection with said water-plant, which now enures or may hereafter enure to said party of the first part, and the said party of the first part hereby makes, constitutes and appoints the party of the second part, its successors and assigns, its true and lawful attorney in fact in its name and in its place and stead, to have, receive, demand, collect and receipt for, all such debts, dues, demands, choses in actions and water rents herein conveyed, for the purposes of the trust in this mortgage expressed, to have and to hold the said rights, privileges, easements, choses in action, estates, property real and personal, effects and assets, above conveyed to the said second party as trustee, and its successors and assigns in trust nevertheless, and subject to the following agreements and stipulations, covenants and trusts, that is to say:

First. This mortgage is given for the purpose of securing payment (1st) of the interest on said bonds in full; (2nd) the principal of such of said two hundred bonds hereinbefore described as shall at any time be outstanding, according to the promises and agreements contained in said coupons and bonds, respectively, but pro rata and without any preference or priority between different bonds, it being understood that the lien of this mortgage is to secure the payment of all interest on all of said bonds in full, prior to the payment of any principal, the payment to be made said coupon-holders or bond-holders by said Trustee or by any receiver or officers acting as Master in Chancery or in case of foreclosure, or however the monies shall come to the said Trustee, master or receiver, shall be paid pro rata, 1st, to pay said interest; 2nd, said principal, without any preference or priority, and each of said bonds shall be deemed to be equally secured by this mortgage and all supplementary conveyances or mortgages.

Second. So long as the first party shall observe, do, keep and per-

form, all and singular, the promises, agreements, covenants and stipulations in said bonds and coupons and in this mortgage contained, and shall well and truly pay or cause to be paid, the interest and principal of the debt evidenced and promised to be paid by said bonds and coupons, at the time, in the manner, and at the place therein mentioned for the payment thereof, it, the said first party, may retain possession of all mortgaged rights, franchises, privileges, easements, estate, choses in action, property real and personal,
45 effects and assets, without let or hindrance from the second party.

Third. In case the said first party shall pay the interest on said bonds as the same becomes due and payable at the time, in the manner, and at the place the same is payable, according to the terms of said bonds and coupons, and shall well and truly pay the principal of said bonds at the time, in the manner, and at the place for the payment thereof, according to the terms of said bonds, and shall upon demand pay all the expenses of administering the trusts, and shall during the continuance of the lien of this mortgage, observe, do keep and perform, all the covenants, agreements and stipulations herein contained, and all things by it to be observed, done, kept and performed, according to said bonds and coupons and this mortgage, then the said party of the second part shall cause this mortgage to be released and discharged (but at the expense of the first party), and all the mortgaged rights, privileges, franchises, easements, choses in action, property, estate effects and assets, shall be released from the operation of the same.

Fourth. But should the said first party at any time make any default in the payment of the interest on said bonds, or any installment, or any part of any installment thereof, at the time in the manner, or at the place when and where said interest or any installment, or any part thereof, shall be due and payable, according to the terms of said bonds and coupons, or should the said first party make any default, or neglect, or refuse, or in any manner fail to observe, do, keep, and perform, all and singular, each and every covenant, promise, agreement, and stipulation in said bonds and coupons and this mortgage contained and by it to be observed, done, kept and performed, then the said second party may, at its option, in case such default, neglect, refusal or failure, shall extend for the period of ninety days, declare the whole sum, principal and accrued interest, evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default.

Fifth. In case of any default in the payment of the principal sum evidenced by said bonds, according to promises and agreements therein contained, or any default in the payment of interest, according to the provisions and agreements of said bonds or coupons, and in case of any default, neglect, or failure to observe, keep and perform, all and singular, each and every covenant, agreement,
46 promise and stipulation in said bonds and coupons and this mortgage contained and by the first party to be observed, kept and performed, all the right of the first party to retain any possession of the mortgaged rights, privileges, franchises, easements,

choses in action, estate, property real and personal, effects and assets, shall immediately cease, and therefrom the right of possession of the same shall immediately vest in said second party, and the second party may at once enter into possession thereof, and the said first party and each and every occupant remove and put out, and may have, receive, sue for, collect, and receipt for in its own name or that of the first party, all and singular the water-rentals or prices due or to become due from any person, firms or corporations at Alton, Illinois, and all and singular the income of the first party, on account of its waterworks at Alton, receive and have, and all debts, dues and demands, of whatever nature or kind, derived from said works, receive, receipt for and appropriate to the purposes of the trust created by this instrument, and may during such time as it may seem fit and best, with or without foreclosing the mortgage, continue in the possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, and operate the works of said first party, and carry out and perform, the contracts of the first party with its customers, and make new contracts for the supplying of water, and by means of the works and machinery of the first party, supply water and do, all and singular, the acts and things which the said first party could do in the premises if it had remained in possession of the same.

Sixth. And in case of any default as aforesaid, in the payment of interest or principal upon said bonds or coupons according to the terms and provisions thereof, which shall continue for ninety days, or in case of any default, neglect, refusal or failure to observe, do, keep and perform, all and singular, the covenants, conditions, promises, agreements, and stipulations in said bonds and coupons or in this mortgage contained, it shall and may be lawful for the said second party to foreclose this mortgage, and in case of such foreclosure or any proceedings therefor, the said second party may, at the commencement of suit, and before any plea, answer or demurrer is filed, apply for the appointment of a receiver of all the rents and profits, debts, dues, demands, and choses in action, and the property, estate, and assets of the first party hereby mortgaged
47 and conveyed or intended so to be, or which it shall then possess or be entitled to, or interested in at Alton, Illinois, and such receiver shall be appointed without any opposition from the first party and such Receiver shall be vested with all the rights and privileges and subject to all the duties and obligations granted to and obligatory upon the second party in case of entry into possession and as specified in the Fifth sub-division of this mortgage, and in case of any foreclosure of this mortgage the whole sum of the indebtedness evidenced by said bonds and coupons, both principal and interest shall be deemed to be due and payable, and such foreclosure shall be to satisfy such whole sum.

Seventh. In no event shall any expense of any kind fall upon said Trustee, but all its expenses and costs, including the fees and charges of attorneys and agents employed by it in good faith in the administration of the trust herein contained, shall be paid by the first party.

Eighth. In case of an entry and taking possession by the said second party, or in case of any foreclosure proceedings or in case of the appointment of any receiver, or in case of the receipt of any monies by the second party or any Receiver or officer of Court, from any income, debts, dues or demands, collected or received by it, him or them, for any sale of the things or any of them, herein mortgaged or conveyed or intended so to be, or hereafter conveyed by any assignment, conveyance or supplementary mortgage, the costs and expenses of all kinds of the said Trustee in the administration of the trust, or foreclosure and sale, of courts, officers and receivers, shall be first paid out of said monies, and the surplus, if any, shall be devoted to paying the whole of the indebtedness secured hereby, interest and principal, pursuant to the terms of the first above clause, until the whole thereof is paid, and if there should remain any surplus, the same shall be paid over to the said first party.

Ninth. The said second party as Trustee hereby stipulates and agrees that it will deliver the said one hundred bonds numbered from No. 1 to No. 100, both inclusive, on demand on presentation to it, of an order signed by the President and Treasurer, under the seal of the first party, and that it will safely keep the said one hundred bonds numbered from No. 101 to No. 200, both inclusive, and will not issue or deliver the same, or suffer the same to become outstanding except upon the terms and conditions hereinbefore expressed, and that it will, at any time after January A. D. 1898, deliver so many of the same as may be applied for by said first party on
48 an order executed by its President and Treasurer accompanied by the sworn statement hereinbefore mentioned. It is hereby stipulated and agreed that the order of the President and Treasurer, under the seal of the first part shall be sufficient evidence of the action of the first party in ordering the issue and delivery of any of the bonds secured by this mortgage, and such order accompanied by the sworn statement hereinbefore specified shall be conclusive to procure the issue of said one hundred bonds last mentioned and placed in trust.

Tenth. The party of the second part, as Trustee or otherwise, shall be under no obligations to recognize any person or persons, firm or corporations, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or owner, until such supposed holder or holders, shall produce the said bonds and deposit the same with the Trustee, and shall indemnify and save harmless the Trustee, to its full satisfaction, from any and all costs and expenses, out-lays, and counsel fees, and other reasonable disbursements for which it may become liable or responsible on proceeding to carry out such request or demand.

Eleventh. The right of action under this indenture is vested exclusively in the Trustee, and under no circumstances shall any bondholders or any number of bondholders have any right to institute an action or any other proceedings on or under this indenture

for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the Trustee to perform any duty imposed upon it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the Trustee according to its sound discretion; but the Trustee shall be under no obligation to institute any such suit or to take any proceedings under this indenture until it shall be indemnified to its full satisfaction for all expenses and costs of every kind and also for all possible claims for damages.

Twelfth. Should any suit or other proceeding be brought against the Trustee by reason of any matter or thing connected with the trusts hereby created, or by reason of its being such Trustee, it shall be under no obligation to enter any appearance by counsel or in any way to appear in and defend the said suit or other pro-
49 ceeding until indemnified to its satisfaction for so doing, but it may nevertheless appear and defend the same without indemnity if it shall elect so to do, and in such case it shall be compensated therefor from the trust fund.

Thirteenth. In case at any time it shall be necessary and proper for the Trustee to make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing any thing as such Trustee, the certificate of the first party of the first part, under its corporate seal, attested by the signature of its president, and the affidavit of one or more Directors, shall be sufficient evidence of such fact to protect the Trustee in any action that it may take by reason of the supposed existence of such fact.

Fourteenth. It shall be no part of the duty of the party of the second part to see to the recording of this indenture as a mortgage or conveyance of real estate, or to the filing thereof as a chattel mortgage, or renewing such mortgage, or to do any other act which may be suitable and proper to be done for the continuing of the lien of this indenture, or for giving notice of the existence of such lien; nor shall it be any part of its duty to effect insurance against fire or other damage to any portion of the mortgaged property or to renew any policies of insurance.

Fifteenth. The Trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employé selected with reasonable discretion.

Sixteenth. The Trustee shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any duties that it may at any time perform in the discharge of the same; and all such fees, commissions, compensations and disbursements shall constitute a lien on the mortgaged property and premises.

Seventeenth. It is further stipulated and agreed that in case the said Trustee shall desire for any reason to surrender the trust conferred upon it by this instrument, it may at any time do so, and may nominate its successor, and if said person so nominated is a

fit and proper person the said first party shall by resolution of the Board of Directors confirm the said nomination and certify the same to the said second party, and in such case the said second
50 party may transfer the trust by deed properly executed to the successor so chosen; or the said second party may in its discretion in the first instance, or in case the parties fail to agree, and with or without the consent of the first party, apply to any Court then having equity jurisdiction in the County in which the mortgaged property or any part thereof shall be then situated, either a court of the United States or the State of Illinois, for the appointment of such successor, and such Court may appoint a successor to the second party; and it is agreed and stipulated that the successor so appointed, whether by act of the parties or by a court, upon accepting the same, shall succeed to all the interests, rights and privileges and be subject to all the duties and obligations pertaining to the second party hereto and to all intents and purposes become and by the second party to this instrument and any subsequent or supplementary assignment, conveyance or mortgage, the same as if originally named therein.

Eighteenth. And it is further stipulated and agreed that during the continuance of this mortgage the said first party will not commit or suffer to be committed any waste, *or* its property or assets by this instrument. It is further agreed and stipulated that at all times during the continuance of this mortgage it will promptly and before any penalty or forfeiture shall attach in due season, pay or cause to be paid all taxes, levies and assessments laid upon it or its property or assets by any lawful authority, and in case of failure to do so, the said Trustee may pay the same and add the same to the sum secured by this mortgage, and the same, with six per cent interest shall be referred to the debt evidenced by said bonds and coupons and any breach of this agreement for the payment of taxes for the space of three months shall entitle the Trustee to declare the whole sum due, and to enter and take possession or to foreclose this mortgage or both; and it is further stipulated and agreed that during the continuance of this mortgage the said first party will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired.

Nineteenth. It is understood and agreed that all the conveyances covenants, agreements and stipulations herein mentioned apply to and bind as well the successors and assigns of the respective parties as the parties themselves.

Twentieth. It is hereby declared that the receipt or receipts the Trustee shall be a sufficient discharge to the purchas
51 or purchasers at any sale or sales made by the said Trustee under or in pursuance, *or* any or either of the provisions for that purpose herein contained, for his or their purchase money and that such purchaser or purchasers, his or their heirs, executors or administrators, shall not after payment thereof, and having such receipts, be liable to see to its being applied for or upon the purpose and trusts of these presents, or in any manner howsoever

be answerable for any loss, misapplication, or non-application of such purchase moneys, or any part thereof, or to be obliged to inquire into the necessity, expediency or authority of or for any such sale.

Twenty-first. No delay or omission of the said Trustee or the holders of the bonds secured hereby in respect of any default happening or continuing as aforesaid, to exercise the rights and powers arising therefrom, as hereinbefore provided, shall be held to exhaust or impair such rights and powers, or to be construed to be a waiver of such defaults, but it is hereby mutually agreed as conditions subject whereto the bonds secured hereby are issued and held by each successive holder, that the holders of a majority in interest at any time outstanding may by an instrument under their hands and seals or resolutions adopted at a meeting of such bondholders, waive or instruct the Trustee to waive any default occurring and the rights accruing therefrom, on such terms and conditions, or without any conditions, as to such majority shall seem proper, provided always that no such action of the bondholders shall extend to or be taken to effect any subsequent defaults or impair the rights resulting therefrom unless expressly provided for. Any such majority of bondholders may in like manner if upon default, as hereinbefore provided, the principal of all or any of the bonds hereby secured shall have become, or be by said Trustee declared due and payable before the period therein mentioned for the payment thereof shall have expired, waive such default or reverse the action of said Trustee in that behalf, and on default in payment at maturity of the principal of any of the bonds secured hereby, such majority may in like manner waive such default and any rights arising therefrom, respecting any bonds secured hereby not then matured, and extend the time for payment of the principal of such as shall have matured or any part thereof, for such period or periods, not exceeding five years, with such provisions for interest in the meantime as shall to such majority seem proper, provided
52 the rate of interest shall not be reduced, unless the reduction be uniform on all the bonds at the time outstanding, and ratably at the rate therein provided respectively, and if, upon any default as aforesaid, the said Trustee shall either on his own motion or after requisition and indemnification, proceed to execute the power of entry or that of sale, or both, or take legal proceedings for the enforcement of the rights of bondholders accruing from such defaults, it shall be competent for such majority in interest, in manner aforesaid, to instruct the said Trustee to suspend or postpone the execution of such powers, or the prosecution of such legal proceedings for a period definite or indefinite, but not longer than five years, with such uniform provisions with regard to interest accruing or principal maturing in the meantime, and arrears of interest on bonds matured, as to such majority may seem expedient, which instruments if so given shall be controlling and shall be conformed to, and any such action by the majority as in this article provided shall be binding and conclusive upon all the bondholders, the intent of this provision being to afford time for the resuscita-

tion of the Company's finances in case of disaster thereto, or appointment of the present expectations, if a majority in inte of such bondholders shall deem it expedient.

Twenty-second. On any sale, whether by said Trustee or Court, of any of the property hereby conveyed, or any part ther the Trustee shall have the right to buy in the same, and the hol of a majority in amount of the outstanding bonds, shall have right by written instrument, under the hands and seals of s majority, to fix a sum which it shall be the duty of the Truste bid for the property to be sold, on behalf and for the benefit of s bondholders, but only on condition that due provision is made such majority to the satisfaction of the said Trustee or a co as the case may be, for the payment in cash of all expenses incu in the execution of the trusts of these presents, and of the pro tion of such sum payable to the bondholder not concurring in s request.

On any purchase the Trustee shall hold the property so p chased upon trust for the equal benefit of the bondholders who required the Trustee to buy in the property in their behalf, as absolute property of said bondholders, without any right of demption or resale in favor of said Company or any bondhold

Twenty-third. The Trustee shall have power to rel
53 from the lien of this mortgage any land, machinery or o
property which has become useful for the purpose of Company from any cause, but only on condition that such prop be forthwith replaced by other property of equal value and sub to the lien of these presents.

Twenty-fourth. And Whereas, by reason of distance, lapse time or other accident, the duties of the actual execution of indenture of mortgage and trust by the various parties thereto, be previous or subsequent to the day on which it bears date, it is hereby expressly agreed and declared that this indenture mortgage and trust shall be dated the First day of October, A. One Thousand Eight Hundred and Ninety-seven, and shall valid and effectual as if executed on the day of the date her and this indenture of Mortgage and trust is the indenture of m gage referred to in its bonds hereinbefore mentioned, the f whereof is hereinbefore set forth, and is made and executed by between the parties hereto as and for the indenture of mortg and trust securing and intended to secure said bonds, as in bonds is mentioned and recited. And in further consideratio the premises of the said first party, for itself, its successors assigns, doth covenant, grant, bargain and agree to and with said second party, its successors and assigns, that it is well seize all the mortaged property and assets; that there are no mortg or mechanics' liens on any of the property rights, choses in act or assets hereby conveyed or intended so to be, which are prio the lien created by this instrument, and that all said rights, p leges, easements, estate, property real and personal, effects and a hereby conveyed and mortgaged or intended so to be, against lawful claims it will forever warrant and defend.

And in further consideration of the premises, the said first party for the further assurance of the second party and the holders of said bonds, doth covenant, grant, bargain and agree to and with the second party that it will at any time in the future, upon demand, at its own expense, execute, deliver and record (if proper for record) all such further and other conveyances, assignments and supplementary mortgages of the rights, privileges, easements, estate, choses in action, property real and personal, effects and assets, now owned by it at Alton, Illinois, whether covered by this conveyance or not and of any right, privilege, easement,
54 estate, choses in action, real and personal property, effect and assets which it may at any time hereafter acquire which pertain to its Alton Water-plant, as the said second party may demand, to subject the same to the lien of this mortgage and such further and other conveyances, assignment and supplementary mortgages shall be deemed a part of this instrument and form together one security for the payment of the debt evidenced by said bonds and coupons. And in further consideration of the premises the said first party doth covenant, bargain and agree to and with the second party that during the continuance of this mortgage it will not suffer or permit any lien of mechanics or material men or others of any kind, or any incumbrance of any kind, upon any of the property hereafter to be acquired or assets, which shall be prior to the lien of this mortgage or before the execution of an instrument subjecting the same to the lien of this mortgage. The recitals herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of any statement herein contained. The Trustee hereunder shall not in any event have any duty or responsibility as to the validity hereof or the security hereby afforded nor as to the execution, acknowledgment, recording or reneweal hereof, nor (unless said Trustee is called upon to take active measures to enforce the security by foreclosure or otherwise, with due indemnity) as to the indemnity, taxes or repairs, or any other matters affecting the security; and in general it is understood that prior to being called upon their sole duty is confined to certifying bonds as of the series mentioned herein;"

the said deed being duly executed in behalf of and by the said Boston Water and Light Company and duly executed and accepted so far as the same was required in everywise whatsoever by the said International Trust Company.

And your orators and oratrixes further show and aver that the said International Trust Company then and there became the trustee of the said bonds as described herein, and particularly of the bonds of your complainants, and your complainants did in open market, for due consideration and for full consideration, obtain and each of them became possessed of bonds issued out of and under the said deed, and under, through and by the said International Trust Company as trustee, so far as the said trust deed permitted, in the following sums and amounts: the said Allen A.

Brown in the sum of Twelve thousand dollars; the said
55 Robert B. Wilson in the sum of ten thousand dollars; the said Harriet N. Houghton in the sum of ten thousand dollars; the said James Schouler in the sum of ten thousand dollars; the said C. A. Damon in the sum of four thousand dollars; the said Joseph C. Foster in the sum of two thousand dollars; the said Chas. M. Page in the sum of two thousand dollars; the said Geo. W. Fairbank in the sum of one thousand dollars; the said M. C. Grier in the sum of one thousand dollars; the said Sabra Hodgkins in the sum of one thousand dollars; the said Wm. B. Trask in the sum of one thousand dollars; the said Mary A. Evans in the sum of one thousand dollars; and the defendants The C. H. Venner Co. and Cidele Venner in the sum of Fifty-six thousand dollars; the said James Howe in the sum of two thousand dollars; the said John Farquhar, Administrator of the Estate of Benjamin F. Dudley in the sum of one thousand dollars; the said George F. Lovett in the sum of one thousand dollars; the said Vernon Prouty in the sum of one thousand dollars; the said George W. and Chester B. Sumner, executors of the Estate of Wm. H. Sumner in the sum of five thousand dollars; the said Orin Warren in the sum of two thousand dollars; the said Frank Drumgoole in the sum of one thousand dollars; and the said Alice G. Page in the sum of one thousand dollars.

And your orators allege that the said International Trust Company thereupon became the Trustee by virtue of the said indenture or deed of trust, for the sole purpose only of certifying the bonds secured thereby and of foreclosing the said trust deed for the benefit of the bondholders, in the event of the failure of the said Boston Water & Light Company to comply with the covenants of said trust deed and concerning the bonds secured thereby. That the said defendant Trust Company now has and since the execution and delivery to it of the said trust deed has had no interest in the property then owned or subsequently acquired by the said Boston Water & Light Company, and mortgaged or intended to be, by the said trust deed, save and except as a trustee for the purpose hereinbefore alleged.

That your orators and oratrices and other holders of the bonds described in and secured by said trust deed are the only real parties in interest other than the mortgagor, having any valid claims to the property created and owned by said Boston Water & Light Company at Alton and Upper Alton in the State of Illinois and mortgaged or intended to be by said trust deed.

56 And your orators and oratrixes further represent that they are the respective owners and holders of the bonds secured by the foregoing trust deed in the following manner towit: the said Allen A. Brown in the sum of twelve thousand dollars; the said Robert B. Wason in the sum of ten thousand dollars; the said Harriet N. Houghton in the sum of ten thousand dollars; the said James Schouler in the sum of ten thousand dollars; the said C. A. Damon in the sum of four thousand dollars; the said Joseph C. Foster in the sum of two thousand dollars; the said Chas. M. Page in the sum of two thousand dollars; the said Geo. W. Fairbank in the

sum of one thousand dollars; the said M. C. Grier in the sum of one thousand dollars; the said Sabra Hodgkins in the sum of one thousand dollars; the said Wm. B. Trask in the sum of one thousand dollars; and the said Mary Evans in the sum of one thousand dollars; that the interest on said bonds was due and payable on April first and October first of each year from the date of making said bonds; which said bonds, together with interest thereon, remain wholly unpaid and unsatisfied, and because of the default in the payment of interest upon said bonds your orators and oratrixes have elected to declare the whole amount due upon said bonds, together with interest and charges thereon, to be payable immediately.

That in the said trust deed and agreement between the International Trust Company and the Boston Water and Light Company, and particularly under Paragraph XII, it was specifically provided that the said trustee should be under no obligation to defend any suit or proceeding brought against it as trustee until indemnified to its satisfaction for so doing, and electing and reserving to the said Trust Company to appear and defend if it shall elect so to do, being compensated therefor from the trust fund; but, further, the said trust deed specifically provided in Paragraph XXIV that the said trustee should have no duty or responsibility as to the validity of the said trust deed or the things therein contained, or the security thereby afforded, nor, unless said trustee is called upon to take active measures to enforce the security by foreclosure, is it to seek indemnity, and it was specifically provided in Paragraph XXIV of the said trust deed that prior to the said Trust Company being called upon to foreclose the security its sole duty is confined to certifying the aforesaid bonds, as of the series mentioned, as appears by the words
57 and provisions of said mortgage and particularly Paragraph XXIV of said trust deed.

And your orators and oratrixes allege that they, and each of them, have duly demanded of the International Trust Company that the said Trust Company foreclose the said mortgage, towit: the said trust deed, upon the property herein referred to, for and in behalf of your orators and oratrixes, the said bondholders named as complainants, but that the said Trust Company, for reasons satisfactory to itself declined to take such action; and your orators and oratrixes allege that they are informed, the said Trust Company is not by law called upon to do anything further or other than that which has been done heretofore by it looking towards the collection of the interest upon the said bonds, and therefore the said Trust Company declined to take action looking to the foreclosure of the said mortgage and trust deed in behalf of and for your orators and oratrixes.

And your orators and oratrixes allege that the interest on all the bonds heretofore described and held by your orators and oratrixes remain- unpaid and unsatisfied; that there has been default in the payment of the said interest upon all the bonds herein described, towit: made respectively on April 1, and October 1st, 1902, 1903, 1904 and 1905, and that under and by virtue of the provisions of the deed of trust the said default has been complete, and the right under the said deed, as therein set forth, to foreclose the lien in behalf of the bondholders herein for the protection of their interests, has arisen and

now exists. Wherefore and by reason of the said International Trust Company declining and refusing to foreclose the said deed of trust and protect your orators and oratrixes in the collection and marshalling of the said property named in the said deed, to the end that the same may be applied to your orators and oratrixes, and for the payment of their bonds, it becomes necessary for your orators and oratrixes to seek relief in a court of equity, and seek the foreclosure of the said trust deed and such other proceedings as shall be necessary to applying the said property named in the said deed of trust, and the proceeds thereof, to the payment of the bonds and the claims of your orators and oratrixes.

And your orators and oratrixes allege that their interests are in common, that the said bonds stand equally in point of date and security; that all the questions of fact which apply to one apply
58 to all alike, that all the questions of law and equity which apply to or legally exists to the right of one apply to all alike; that all questions of law or equity which may go or can go to the opposition of one or to the defense of the same apply to all alike; and that all questions of whatsoever nature, towit: of the rights of your orators and oratrixes, or of the defendants herein, or any of them, could all be determined in any proceeding; and any question which may arise as to any one of the bondholders, can all be determined in the single issue and in the single proceedings here and now instituted, to the complete relief of all parties herein interpleaded, and to the complete equity and relief of all parties in the premises, and that to avoid multiplicity of actions and great cost and expense, it becomes the office of equity to permit, and is in the procedure of equity that, your orators and oratrixes maintain their action in one bill, to the end that adequate and speedy remedy in equity may be afforded all of your complainants in one concise proceeding, disposing of all question and property at issue applying in common to all of your complainants and defendants in similar situation alike.

And your orators and oratrices allege that it is meet and advisable that the said property described in the said trust deed be at once seized and taken possession of by this Honorable Court, through its aid and arm, to the end that the incomes, rents and issues be conserved, and that a receiver or other custodian be named by the court to take charge of the said property and conserve its issues, rents and profits pending the controversy over the same, and pending the foreclosure, to decree of the said trust deed for and in behalf of the said bondholders herein as complainants. And your orators and oratrices here and now tender the said bill for and in behalf of all other bondholders similarly situated as they are, and pray that they may enter herein and be permitted to enter herein upon such terms as equity would direct.

And your orators and oratrices allege that it is meet and appropriate in equity that the said property be adjudged the property of the said Boston Water and Light Company, duly pledged to the International Trust Company for the security of your orators and oratrices and other holders of said bonds situated as they are, and that the said property be brought into court by due process, and adjudged to be the security for the bonds owned by your orators and

others, and that the said trust deed be foreclosed, with such equity of redemption as therein is permitted, and that after due
59 hearing of the parties herein an order of sale of the said property be made, ordering the said property to be sold, in order that the proceeds from the same shall be applied to the payment of your orators and oratrices as bondholders and of such persons as may be similarly situated as they are. And your orators and oratrices here and now offer to pay any and all expense that may be necessary to the proper protection of the said property in their own behalf, in order that the same may be conserved as security and for the due payment of the bonds of your orators and oratrices.

And your orators and oratrixes further represent unto your honor and state upon information and belief that said Boston Water and Light Company, a corporation, International Trust Company, a corporation, Alton Water Company, a corporation, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. H. Sumner, James Howe, Orin Warren, Alice G. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Dromgoole, The C. H. Venner Company, a corporation, Cidele Venner, Samuel Peck, G. Ralph Leighton, Charles G. Sanford, Russel Frost, The Alton Water Company, a corporation, Illinois State Trust Company, a corporation, and some unknown parties, have or claim to have some interest in the said mortgaged premises, or some part thereof, as purchaser, mortgagee, judgment creditors or otherwise, which interests, if any, have accrued subsequent to the lien of the said mortgage of your orators and oratrixes and subject thereto.

Your orators and oratrixes therefore ask the aid of this Honorable Court in the premises, and makes the said Boston Water and Light Company, a corporation, Internation- Trust Company, a corporation, Alton Water Works Company, a corporation, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. H. Sumner, James Howe, Orin Warren, Alice G. Page, John Farquhar, Administrator of Estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Dromgoole, Cidele Venner, the C. H. Venner Co., a corporation, Samuel Peck, G. Ralph Leighton, Charles G. Sanford, Russel Frost, The Alton Water Company a corporation and the Illinois State Trust Company a corporation and unknown parties claiming or holding an interest in the property heretofore described, parties defendant to this bill, and to the end that they may be required to answer, this, your orators' and oratrixes' bill, according to the rules and practice of this Honorable Court,
60 without oath, their answer on oath being hereby waived; that an account may be taken in this behalf by or under the direction of this court; that the said defendant Boston Water and Light Company or either of said defendants, may be decreed to pay your orators and oratrixes whatever sum shall appear to be due upon the taking of such account, together with solicitor's fees and costs of this proceeding, by a short day to be fixed by the Court; that in default of such payment, the said mortgaged property may be sold, as may be directed by the court, to satisfy the amount due your orators and oratrixes for principal and interest on the said bonds

and mortgage and solicitor's fees and court costs and other expenses of this proceeding; that in case of such sale and in failure to redeem therefrom, pursuant to the statute, the defendants, and all persons claiming through or under them subsequent to the commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in the said premises; that your orators and oratrixes may have execution against the said defendant Boston Water and Light Company for any balance that shall remain due to your orator- of the principal and interest of said bonds and mortgage, if the sale of said mortgaged premises as aforesaid fail to produce sufficient to pay the whole of said mortgage debt and solicitor's fees and costs of this suit; and that your orators and oratrixes may have such other and further relief as the nature of the case may require, and as to this court shall seem agreeable to equity and good conscience.

May it please your honor to grant unto your orators and oratrixes the writ of summons in chancery, issuing out of and under the seal of this Honorable Court, directly to the sheriff of said County of Madison, commanding him that he summon the said defendants, Boston Water and Light Company, a corporation, International Trust Company, a corporation, Alton Water Company, a corporation, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. H. Sumner, James Howe, Orin Warren, Alice G. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Dromgoole, The C. H. Venner Co., a corporation, Cidele Venner, Samuel Peck, G. Ralph Leighton, Charles G. Sanford, Russell Frost, the Alton Water Company, Illinois State Trust Company a corporation, and other unknown parties claiming an interest in the property hereinbefore described to appear before the said court, on the first
61 day of the next term thereof, to be held at the Court House in the County of Madison aforesaid, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree as shall seem agreeable to equity and good conscience.

And your orators and oratrixes will ever pray, etc.

(Signed) ALLEN A. BROWN, *Trustee;*
ROBERT B. WASON,
HARRIET N. HOUGHTON,
JAMES SCHOULER,
C. A. DAMON,
JOSEPH C. FOSTER,
CHAS. M. PAGE,
GEO. W. FAIRBANK,
M. C. GRIER,
SABRA HODGKINS,
WM. B. TRASK,
MARY A. EVANS,
By JAS. HAMILTON LEWIS,
*Their Solicitor.*

E. N. ZOLINE,
*Of Counsel.*

(Indorsed:) Filed July 13, 1907. James T. Jones, Clerk.

62 And afterwards to-wit, on said 13th day of July at the June term of said Court in the year last aforesaid the following proceedings were had in said Court in said cause and entered of record to-wit:

*Order of July* 13, 1907.

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Now on this the 13th day of July 1907 comes the Alton Water Company and files its bill of complaint in above entitled cause and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demure to said bill on or before the 17th day of August 1907 and that a copy of this order certified by the Clerk of this Court and under the seal of this Court be served upon each of said defendants.

63 And afterwards to-wit, on the 14th day of August in the June term of said Court in the year last aforesaid the following further proceedings were had in said Court in said cause and entered of record to-wit:

*Order of August* 14, 1907.

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

On motion of the defendant Elijah N. Zoline, it is ordered by the Court that the time for all of the defendants named in the above entitled cause to file their respective appearances either general or special and file such pleas affecting the jurisdiction of the Court or such other pleadings at their discretion, is hereby extended to October 11th 1907.

64 *Certified Copy of Order of July* 13, 1907.

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

SATURDAY, *July 13th, A. D.* 1907.

Present, Hon. Francis M. Wright, District Judge.

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Now on this the 13th day of July 1907, comes the Alton Water Company and files its bill of complaint in the above entitled cause,

and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August 1907, and that a copy of this order, certified by the Clerk of this Court and under the Seal of this Court, be served upon each of said defendants.

65 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the United States for the Southern District of Illinois, Southern Division, do hereby certify that the foregoing is a true and complete copy of an order of Court this day entered in a certain cause wherein the Alton Water Company is complainant and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton and others are defendants, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal of said Court at Springfield in said District this 13th day of July A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Marshal's Return.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, Eastern Division, ss:*

By direction of Levi Davis, Solicitor for the Plaintiff, I have served this writ within my District in the following manner to-wit: Upon the within named James Hamilton Lewis and Elijah N. Zoline, by delivering to each, personally, a true copy thereof, at Chicago, Illinois, on the first day of August, A. D. 1907.

LUMAN T. HOY,
*U. S. Marshal.*
By W. H. WILMOT,
*Deputy.*

66 *Certified Copy of Order of July* 13, 1907.

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

SATURDAY, *July 13th, A. D.* 1907.

Present Hon. Francis M. Wright, District Judge.

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Now on this the 13th day of July 1907, comes the Alton Water Company and files its bill of complaint in the above entitled cause, and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August 1907, and that a copy of this order, certified by the Clerk of this Court and under the Seal of this Court, be served upon each of said defendants.

67 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the United States for the Southern District of Illinois, Southern Division, do hereby certify that the foregoing is a true and complete copy of an order of Court this day entered in a certain cause wherein the Alton Water Company is complainant and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton and others are defendants, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal of said Court at Springfield in said District this 13th day of July A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Marshal's Return.*

Return on Service of Writ.

UNITED STATES OF AMERICA,
*Northern District of New York, ss:*

I hereby certify and return that I served the annexed order on the therein named Charles M. Page, personally at Albany N. Y. in said District of the 22nd day of July A. D. 1907.

CLINTON D. McDOUGALL,
*U. S. Marshal,*
By WM. C. IRVING, *Deputy.*

68 *Certified Copy of Order of July* 13, 1907.

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

SATURDAY, *July* 13*th, A. D.* 1907.

Present Hon. Francis M. Wright, District Judge.

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Now on this the 13th day of July 1907, comes the Alton Water Company and files its bill of complaint in the above entitled cause, and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August 1907, and that a copy of this order, certified by the Clerk of this Court and under the Seal of this Court, be served upon each of said defendants.

69 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the Uni States for the Southern District of Illinois, Southern Division, hereby certify that the foregoing is a true and complete copy of order of Court this day entered in a certain cause wherein the Al Water Company is complainant and Allen A. Brown, Trus Robert B. Wason, Harriet N. Houghton and others are defenda as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal said Court at Springfield in said District this 13th day of July A. 1907.

[SEAL.] JAMES T. JONES, *Clerk*

*Marshal's Return.*

UNITED STATES OF AMERICA,
*Western District of Pennsylvania, ss:*

Served the within Order of Court upon the within named Willi B. Trask, by handing him a true and attested copy, and by mak known the contents thereof to him personally, at Erie, Pennsylva in said District, on the fifth day of August A. D. 1907.

STEPHEN HOWE,
Per ROBERT H. CHINNOCK, *Deputy*

70 *Certified Copy of Order of July* 13, 1907.

In the Circuit Court of the United States for the Southern Dist of Illinois, Southern Division.

SATURDAY, *July* 13*th, A. D.* 1907

Present Hon. Francis M. Wright, District Judge.

In Chancery.

ALTON WATER COMPANY
vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOU ton, James Schouler, C. A. Damon, Joseph C. Foster, Charles Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Willi B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah Zoline, George W. Sumner and Chester B. Sumner, Executors the Estate of William Sumner, Deceased; James Howe, Or Warren, Alice S. Page, John Farquhar, Administrator of Estate of Benjamin F. Dudley, Deceased; George F. Lov Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cid Venner.

Now on this 13th day of July 1907, comes the Alton W Company and files its bill of complaint in the above entitled ca

and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August 1907, and that a copy of this order, certified by the Clerk of this Court and under the Seal of this Court, be served upon each of said defendants.

71 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the United States for the Southern District of Illinois, Southern Division, do hereby certify that the foregoing is a true and complete copy of an order of Court this day entered in a certain cause wherein the Alton Water Company is complainant and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton and others are defendants, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal of said Court at Springfield in said District this 13th day of July A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Marshal's Return.*

Served the within Order on the defendant, C. H. Venner Company on the 12th day of August, A. D. 1907 at Jersey City, in the District of New Jersey, by delivering to and leaving with Frank E. Williamson Registered Agent Defendant Company personally a copy thereof and at the same time showing him this original with the seal of the Court attached and informing him of its contents.

THOMAS J. ALCOTT,
*United States Marshal.*

72 *Certified Copy of Order of July 13, 1907.*

In the Circuit Court of the United States for the Southern Distr
of Illinois, Southern Division.

SATURDAY, *July 13th, A. D.* 1907.

Present Hon. Francis M. Wright, District Judge.

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUG
ton, James Schouler, C. A. Damon, Joseph C. Foster, Charles
Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Willia
B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah
Zoline, George W. Sumner and Chester B. Sumner, Executors
the Estate of William Sumner, Deceased; James Howe, Orr
Warren, Alice S. Page, John Farquhar, Administrator of t
Estate of Banjamin F. Dudley, Deceased; George F. Love
Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cide
Venner.

Now on this 13th day of July 1907, comes the Alton Water Co
pany and files its bill of complaint in the above entitled cause, a
it appearing to the Court by said bill that none of the defendan
therein named are inhabitants of the Southern District of Illino
or can be found therein, it is therefore ordered by the Court that sa
defendants appear and plead, answer or demur to said bill on
before the 17th day of August 1907, and that a copy of this orde
certified by the Clerk of this Court and under the Seal of this Cou
be served upon each of said defendants.

73 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the United Stat
for the Southern District of Illinois, Southern Division, do hereb
certify the foregoing is a true and complete copy of an order
Court this day entered in a certain cause wherein the Alton Wat
Company is complainant and Allen A. Brown, Trustee, Robert
Wason, Harriet N. Houghton and others are defendants, as th
same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal
said Court at Springfield in said District this 13th day of Jul
A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Marshal's Return.*

UNITED STATES OF AMERICA,
*District of Maine, ss:*

AUGUST 3, A. D. 1907.

I have made diligent search for the within named George W. Sumner and Chester B. Sumner, and am unable to find them or either of them in this District, but am informed that George W. Sumner resides at Omaha, Neb., and that Chester B. Sumner resides at Schuyler, Neb. I therefore return this Order of Court, without service.

WINFIELD S. HASTY,
*Deputy U. S. Marshal, District of Maine.*

*Marshal's Return.*

UNITED STATES OF AMERICA
*District of Maine, ss:*

AUGUST 14, A. D. 1907.

I have this day served the Order of Court within referred to upon C. A. Damon, within named, at Boothbay, in said District, by delivering to him in hand a copy of said Order, certified by James T. Jones, Clerk of the U. S. Circuit Court for the Southern District of Illinois, under the seal of said Court.

CHARLES B. HASKELL,
*Deputy U. S. Marshal, District of Maine.*

74 *Certified Copy of Order of July* 13, 1907.

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

In Chancery.

SATURDAY, *July* 13*th, A. D.* 1907.

Present: Hon. Francis M. Wright, District Judge.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Now on this the 13th day of July, 1907, comes the Alton Water Company and files its bill of complaint in the above entitled cause,

and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August, 1907, and that a copy of this order, certified by the Clerk of this Court and under the Seal of this Court, be served upon each of said defendants.

75 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the United States for the Southern District of Illinois, Southern Division, do hereby certify that the foregoing is a true and complete copy of an order of Court this day entered in a certain cause wherein the Alton Water Company is complainant and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton and others are defendants, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal of said Court at Springfield in said District this 13th day of July, A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Marshal's Return.*

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

BOSTON, *August* 2, 1907.

I certify that I have this day made service of the within order of court as herein directed by delivering in hand to Sabra Hodgkins, at Boston, a duly attested copy of this order of Court. And afterward upon August 3, 1907, I made service upon Orrin Warren by delivering to him in hand at West Newbury a like duly attested copy of this order of Court. And upon the same day I delivered in hand to George W. Fairbank at Cochituate, a like duly attested copy of this order of Court. And upon August 5, 1907, I delivered two like duly attested copies in hand to George F. Lovett at Melrose and Robert B. Wason each at Boston. And upon the same day I left an attested copy of the within order of court at the last and usual place of abode of Harriet N. Houghton at Brookline with a female servant who is an adult person, and a member of the family. That I made a diligent earch for Allen A. Brown, James Schoulder, C. A. Damon, James Howe, M. C. Grier, John Farquar, and C. H. Venner Co. at Boston, Joseph C. Foster of Salem, and Vernon Prouty of Spencer, and failed to find them, or any last and usual place of abode where service could be made. I therefore return this order without service as to said Brown, Schoulder, Damon, Howe, Grier, Farquar, Venner, Foster and Prouty.

CHAS. K. DARLING,
*U. S. Marshal.*

76 *Certified Copy of Order of July 13, 1907.*

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

In Chancery.

SATURDAY, *July 13th, A. D.* 1907.

Present: Hon. Francis M. Wright, District Judge.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Banjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Now on this the 13th day of July, 1907, comes the Alton Water Company and files its bill of complaint in the above entitled cause, and it appearing to the Court by said bill that none of the defendants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August, 1907, and that a copy of this order, certified by the Clerk of this Court and under the Seal of this Court, be served upon each of said defendants.

77 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division, ss:*

I, James T. Jones, Clerk of the Circuit Court of the United States for the Southern District of Illinois, Southern Division, do hereby certify that the foregoing is a true and complete copy of an order of Court this day entered in a certain cause wherein the Alton Water Company is complainant and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton and others are defendants, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and Seal of said Court at Springfield in said District this 13th day of July A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Marshal's Return.*

Return on Service of Writ.

UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

I hereby certify and return that I served the annexed Certified Copy of Order of Court on the therein-named Chester B. Sumner by handing to and leaving a true and correct copy thereof with him personally at Schuyler in said District *of* the 13th day of August A. D. 1907.

WM. P. WARNER,
*U. S. Marshal.*

78 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

I hereby certify and return that I served the annexed Certified Copy of Order of Court on the therein-named Geo. W. Sumner by handing to and leaving a true and correct copy thereof with him personally at Omaha in said District on this 14th day of August A. D. 1907.

WM. P. WARNER,
*U. S. Marshal.*

*Certificate of Marshal.*

I Hereby Certify, That on the 2nd day of August 1907, at the City of New York, in my district, I personally served the within certified Copy of Order upon the within named, Defendant, Mary A. Evans, at #596 Park Avenue New York City N. Y., by exhibiting to her the within original, and at the same time leaving with her certified copy thereof.

I Hereby Further Certify, That on the 3rd day of August 1907, at Mount Kisco Westchester Co. New York, in my district, I personally served the within Certified Copy of Order upon the within-named Defendant Frank Drumgoole at Mount Kisco, Westchester County N. Y. by exhibiting to him the within original, and at the same time leaving with him a certified copy thereof.

WILLIAM HENKEL,
*United States Marshal,*
*Southern District of New York.*

Dated ——, 190–.

After due and diligent search I am unable to find the within named Cidele Venner in the So. Dist. of New York.

WILLIAM HENKEL,
*U. S. Marshal.*

79 *Affidavit of Levi Davis.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, ss:

In Equity.

THE ALTON WATER COMPANY

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

Levi Davis of the City of Alton in the County of Madison and State of Illinois, being first duly sworn states on oath that he is a solicitor of the complainant in the above entitled cause; that in the bill of complaint filed on the 10th day of June A. D. 1907 in the Circuit Court of Madison County in the State of Illinois, in the suit of Allen A. Brown, trustee, et al., against the Boston Water and Light Company, the Alton Water Company and others, the further prosecution of which suit is sought to be enjoined in the above entitled cause, the place of residence of Allen A. Brown, James Schoulder, M. C. Grier, John Farquhar and James Howe is alleged to be the City of Boston in the State of Massachusetts, the place of residence of Harriet N. Houghton is alleged to be Brookline in said State of Massachusetts, the place of residence of Joseph C. Foster is alleged to be Salem in said State of Massachusetts, the place of residence of George F.
80 Lovett is alleged to be Melrose in said State of Massachusetts, the place of residence of Vernon Prouty is alleged to be Spencer in said State of Massachusetts; that in pursuance of an order entered on the 13th day of July A. D. 1907 in the above entitled cause affiant on July 17th sent 10 certified copies of said order to the United States Marshal for the District of Massachusetts with instructions to serve one of said copies on each of the above named persons and in said instructions affiant mentioned the places of residence of said persons respectively as above alleged.

Affiant further states that said United States Marshal for the District of Massachusetts, on the 13th day of August A. D. 1907 made his return on one of said copies of said order to the effect that he had made diligent search for said Allen A. Brown, James Schoulder, James Howe, M. C. Grier and John Farquhar at said City of Boston and for Joseph C. Foster, of Salem and Vernon Prouty

of Spencer, and failed to find them or any last and usual place of abode where service could be made.

Affiant further states that in said bill of complaint in said suit in the circuit court of Madison County, Illinois, the place of residence of Alice S. Page is alleged to be in the City of Philadelphia in the State of Pennsylvania; that on July 17th 1907 affiant sent two certified copies of said order to the United States Marshall for the Eastern District of Pennsylvania, with instructions to serve one of said copies on said Alice S. Page, and in said instructions affiant stated her place of residence as said City of Philadelphia, and afterwards on the 3rd day of August A. D. 1907 said marshal returned said copies to affiant with the written statement that the same were not served from the fact that the residence of said Alice S. Page was closed and that she was then residing, as he was informed, at Atlantic City. Affiant further states that thereupon he sent two certified copies of said order to the United States Marshal of the District of New Jersey with instructions to serve one of said copies on said Alice S. Page at Atlantic City in said District and said marshall on August 14th 1907 returned said copies to affiant with the statement in writing that he had gone to Atlantic City and endeavored to find said Alice S. Page but could find no trace of any one of that name.

Affiant further states that in said bill of complaint last
81 above mentioned the place of residence of Cidele Venner is alleged to be at the City of New York in the State of New York; that on July 17th 1907 affiant sent two certified copies of said order to the United States Marshal for the Southern District of New York with instructions to serve one of said copies on said Cidele Venner and in said instructions affiant gave her place of residence as said City of New York and afterwards on the 5th day of August A. D. 1907 said marshall returned said copies of said order to affiant with the written statement that after due and diligent search he was unable to find said Cidele Venner in his district and that from information received she was then in Europe.

Affiant further states that neither he nor said Alton Water Company has any knowledge or information of the place of residence or present whereabouts of any of the above named defendants except as above mentioned and this affiant and said Alton Water Company have used due diligence and all the means in their power to have certified copies of said order of court duly served on said defendants and that such service has been impracticable.

LEVI DAVIS.

Subscribed and sworn to before me this 23rd day of August A. D. 1907.

JAMES T. JONES, *Clerk.*

Then afterwards to-wit on the 23rd day of August in the June term of said Court in the year last aforesaid the following further proceedings were had in said Court in said cause and entered of record to-wit:

82 *Order of Aug.* 23, 1907.

In Chancery.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, & Chatesr B. Sumner, Executors of Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

And now comes the said complainant by Levi Davis its solicitor and it appearing to the Court from the affidavit of said Levi Davis on file herein that due diligence has been used to serve a certified copy of the order entered in this cause on the 13th day of July A. D. 1907 on the nine following named defendants to-wit: Allen A. Brown, James Schoulder, Joseph C. Foster, M. C. Grier, James Howe, John Farquahar, Administrator of the estate of Benjamin F. Dudley, deceased, Vernon Prouty, Alice S. Page, Cidele Venner, but without success and that such service is not practicable. It is therefore ordered by the Court that the Clerk of this Court cause said order and the order entered herein on the 14th day of August A. D. 1907 extending the time to appear and plead, answer or demur to said bill to the 11th day of October A. D. 1907, to be published once a week for six consecutive weeks in some public newspaper printed and published in the City of Springfield in the State of Illinois, and that within five days after the first publication of said orders a copy of the newspaper containing such publication be mailed by said Clerk to each of said nine defendants, addressed to them respectively at their respective places of residence state- in said bill of complaint.

POOR COPY

83 *Chancery Notice.*

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

FRIDAY, *August* 23*rd, A. D.* 1907.

Present: Hon. Francis M. Wright, District Judge.

In Chancery.

THE ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

Bill for Injunction.

To Allen A. Brown, James Schoulder, Joseph C. Foster, M. C. Grier, James Howe, John Farquhar, Administrator of the estate of Benjamin F. Dudley, deceased; Vernon Prouty, Alice S. Page, and Cidele Venner, nine of the defendant- in the above entitled cause:

You are hereby notified that the following order is a true and complete copy of an order entered in said cause on July 13th 1907 to-wit:

"Now on this 13th day of July, 1907, comes the Alton Water Company and files its bill of complaint in the above entitled cause and it appearing to the Court by said bill that none of the defend-
84 ants therein named are inhabitants of the Southern District of Illinois, or can be found therein, it is therefore ordered by the Court that said defendants appear and plead, answer or demur to said bill on or before the 17th day of August, 1907, and that a copy of this order certified by the clerk of this Court and under the seal of this Court, be served upon each of said defendants."

And that the following is a true and complete copy of an order entered in said cause on August 14th, 1907:

"On motion of the defendant, Elijah N. Zoline, it is ordered by the Court that the time for all of the defendants named in the above entitled cause to file their respective appearances, either general or special and file such pleas affecting the jurisdiction of the Court or such other pleadings at their discretion, is hereby extended to October 11, 1907." As said two orders appear of record in my office.

In Witness Whereof, I, James T. Jones, Clerk of said Court have

hereunto set my hand and Seal of said Court at Springfield in said District this 23rd day of August, A. D. 1907.

[SEAL.] JAMES T. JONES, *Clerk.*

*Certificate of Publication.*

The Illinois State Journal.
Established 1831.

Certificate of Publication.

STATE OF ILLINOIS,
*Sangamon County, City of Springfield:*

DATED *Sept.* 30, 1907.

The undersigned publisher of The Illinois State Journal, a newspaper published in the City, County and State aforesaid and of general circulation in said County and State, hereby certifies that a notice of which annexed is a true copy has been regularly published in said paper Six Mondays in succession, the first publication being on the 26th day of August 1907, and the last publication being on the 30th day of September 1907.

ILLINOIS STATE JOURNAL COMPANY,
By —— ——.

No. 3760.

Then afterwards to-wit on the 12th day of September in the year last aforesaid came again the complainant by its solicitor and filed in the Clerk's office of said Court its motion for a preliminary injunction which motion is as follows towit—

85 *Motion for Preliminary Injunction.*

Filed Sept. 12, 1907.

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

And now comes the complainant by its solicitor, and moves the Court, upon the face of the bill in the above cause, which said bill is

COPY

duly sworn to, to grant the preliminary writ of injunction agai
the defendants in said cause, as is in said bill of complaint pray

LEVI DAVIS,
*Solicitor for Complainant*

86 *Affidavit of Levi Davis.*

In the Circuit Court of the United States in and for the South
District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET
Houghton, James Schoulder, C. A. Damon, Joseph C. Fos
Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Ho
kins, Wm. B. Trask, Mary A. Evans, James Hamilton Lev
Elijah N. Zoline, George W. Sumner, and Chester B. Sumn
Executors of the Estate of Wm. Sumner, Deceased; Jan
Howe, Orrin Warren, Alice S. Page, John Farquhar, Admi
trator of the Estate of Benjamin F. Dudley, Deceased; George
Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co
pany, and Cidele Venner, Defendants.

Levi Davis, being first duly sworn states on oath that he is solici
for the complainant in the above entitled cause and that on the 1
day of September A. D. 1907 at the City of Alton in the State
Illinois, he mailed, postage paid, to each of the defendants in s
cause a notice properly addressed to said defendants respectively
their respective places of residence, of which notice a true copy
hereto attached marked "Exhibit A."

LEVI DAVIS

Subscribed and sworn to before me this 2d day of October A.
1907.

JAMES T. JONES, *Clerk*

87

EXHIBIT A.

In the Circuit Court of the United States in and for the Southern District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Company, and Cidele Venner, Defendants.

To the Above Named Defendants:—

You are hereby notified that on September 12th, 1907, the complainant filed its motion in the above cause for a preliminary writ of injunction against you as prayed in the bill of complaint in said cause and that an order was entered by the Court in said cause on the same day setting said motion down for hearing on Thursday, the 3d day of October, 1907, before the Court at Springfield, Illinois, and that on the opening of Court on said last mentioned date or as soon thereafter as counsel can be heard, the complainant will apply for said writ of injunction in pursuance of said motion, when and where you may appear and resist such motion if so disposed.

Dated this 13th day of September, 1907.

ALTON WATER COMPANY,
*Complainant,*

By LEVI DAVIS,
*Its Solicitor.*

Mailed Copy to each of the defendants.
September 14th, 1907. L. D.

88 *Demurrer of James Hamilton Lewis.*

In the Circuit Court of the United States in and for the Southe
Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET
Houghton, James Schoulder, C. A. Damon, Joseph C. Fost
Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hod
kins, Wm. B. Trask, Mary A. Evans, James Hamilton Lew
Elijah N. Zoline, George W. Sumner and Chester B. Sumn
Executors of the Estate of Wm. Sumner, Deceased; James Hov
Orrin Warren, Alice S. Page, John Farquhar, Administrator
the Estate of Benjamin F. Dudley, Deceased; George F. Love
Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cid
Venner, Defendants.

The General and Special Demurrer of James Hamilton Lewis, I
fendant, to the Bill of Complaint of The Alton Water Compa
the Above Named Complainant.

This Defendant, by protestation, not confessing or acknowled
ing all or any of the matters and things, in said Complainant's B
of Complaint contained, to be true in such manner and form as t
same are therein set forth and alleged, doth demur to the said Bi
and, for cause of demurrer, showeth that the said Complainant ha
not, in and by its said Bill, made or stated such a case as doth
ought to entitle it to any such discovery or relief as is thereby soug
and prayed for, from and against this Defendant.

And for special cause of said demurrer this defendant showet
First. That it appears on the face of the said Bill that th
89 Honorable Court is without jurisdiction, both over the su
ject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an origi
Bill against this defendant, it appearing from said Bill that th
defendant was not a party to the proceedings referred to in the s
Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appe
ing in the said Bill, this Defendant doth demand the judgment
this Honorable Court, whether he shall be compelled to make a
further or other answer to the said Bill; and prays to be hence d
missed, with his costs and charges, in this behalf, most wrongfu
sustained.

ELIJAH N. ZOLINE,
*Solicitor for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of James Hamilton Lewis to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

ELIJAH N. ZOLINE,
*Solicitor for James Hamilton Lewis.*

*Affidavit of J. Hamilton Lewis.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

James Hamilton Lewis, the defendant, on oath states that he has heard the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

J. HAMILTON LEWIS.

Subscribed and sworn to before me this 3rd day of October, A. D 1907.

JAMES T. JONES, *Clerk.*

90 *Demurrer of Elijah N. Zoline.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of Elijah N. Zoline, defendant, to the Bill of Complaint of The Alton Water Company, the above named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of Complaint contained, to be true in such manner and form as the

same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth, that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this Defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that this
91 Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges — behalf, most wrongfully sustained.

ELIJAH N. ZOLINE,
*Solicitor pro Se.*

I hereby certify that in my opinion, the foregoing demurrer of Elijah N. Zoline, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

ELIJAH N. ZOLINE,
*Solicitor pro Se.*

*Affidavit of Elijah N. Zoline.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

Elijah N. Zoline, the defendant, on oath states that he has heard the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

ELIJAH N. ZOLINE.

Subscribed and sworn to before me this 2 day of October, A. D 1907.

JAMES T. JONES, *Clerk.*

92 *Demurrer of Robert B. Wason.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of Robert B. Wason, defendant, to the Bill of Complaint of The Alton Water Company, the above named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of Compiaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this Defenadnt.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that this
93 Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges, in his behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitor- for Robert B. Wason.*

*Affidavit of Robert B. Wason.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

COMMONWEALTH OF MASSACHUSETTS,
*County of* ——, *ss:*

Robt. B. Wason, the defendant, on oath states that he has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

ROBERT B. WASON.

Subscribed and sworn to before me this 7th day of October A. D. 1907.

[SEAL.] ELMER L. BRIGGS,
*Notary Public.*

94 *Demurrer of Orin Warren.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of Orin Warren, defendant, to the Bill of Complaint of The Alton Water Company, the above named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of Complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or

ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that this
95 Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges, in his behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of Orin Warren, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Orin Warren.*

*Affidavit of Orin Warren.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

COMMONWEALTH OF MASSACHUSETTS,
*County of Essex, ss:*

Orin Warren, the defendant, on oath states that he has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

ORIN WARREN.

Subscribed and sworn to before me this 3rd day of October A. D. 1907.

[SEAL.]

CHARLES H. POOR,
*Notary Public.*

96 *Demurrer of William B. Trask.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of William B. Trask, defendant, to the Bill of Complaint of The Alton Water Company, the above named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of Complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this Defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that this
97 Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges, in his behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of William B. Trask, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for William B. Trask.*

*Affidavit of William B. Trask.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

STATE OF PENNSYLVANIA,
*County of Erie, ss:*

William B. Trask the defendant, on oath states that he has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

WILLIAM B. TRASK.

Subscribed and sworn to before me this 3d day of October A. D. 1907.

[SEAL.]

CLINTON D. HIGBY,
*Notary Public.*

98 *Demurrer of Harriet N. Houghton.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of Harriet N. Houghton, Defendant, to the Bill of Complaint of The Alton Water Company, the Above Named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of

Complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this Defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that this
99 Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges, in his behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of Harriet N. Houghton, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Harriet N. Houghton.*

*Affidavit of Harriet N. Houghton.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

COMMONWEALTH OF MASSACHUSETTS,
*County of Norfolk, ss:*

Harriet N. Houghton the defendant, on oath states that she has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

HARRIET N. HOUGHTON.

Subscribed and sworn to before me this 4th day of November A. D. 1907.

[SEAL.]

CHARLES F. PERKINS,
*Notary Public.*

100 *Demurrer of Charles M. Page.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of Charles M. Page, Defendant, to the Bill of Complaint of The Alton Water Company, the Above Named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of Complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this Defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that this
101 Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges — his behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitor- for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of Charles M. Page, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitor for Charles M. Page.*

*Affidavit of Charles M. Page.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

STATE OF NEW YORK,
*County of Albany, ss:*

Charles M. Page, the defendant, on oath states that he has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

CHARLES M. PAGE.

Subscribed and sworn to before me this 4 day of October, A. D. 1907.

[SEAL.] HOWARD HENDRICKSON,
*Notary Public, Albany Co., N. Y.*

102 *Demurrer of James Schouler.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of James Schouler, Defendant, to the Bill of Complaint of The Alton Water Company, the Above Named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of

Complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth, that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this Defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that
103 this Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint, heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges in its behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of James Schouler, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for James Schouler.*

*Affidavit of James Schouler.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

James Schouler, the defendant, on oath states that he has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said is not interposed for the purpose of delaying said suit or any proceeding therein.

JAMES SCHOULER.

STATE OF MASSACHUSETTS,
*Suffolk, ss:*

Subscribed and sworn to before me this 4th day of November, A. D. 1907.

[SEAL.]

BENJAMIN J. BARRON,
*Notary Public.*

104 *Demurrer of George W. Fairbank.*

In the Circuit Court of the United States in and for the Southern Judicial District of Illinois, *ss:*

In Equity.

THE ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Daman, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The General and Special Demurrer of George W. Fairbank, Defendant, to the Bill of Complaint of The Alton Water Company, the Above Named Complainant.

This Defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said Complainant's Bill of Complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said Bill, and, for cause of demurrer, showeth that the said Complainant hath not, in and by its said Bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this defendant.

And for special cause of said demurrer this defendant showeth:

First. That it appears on the face of the said Bill that
105 this Honorable Court is without jurisdiction, both over the subject matter and parties to the suit.

Second. That said Bill is not an ancillary Bill, but is an original Bill against this defendant, it appearing from said Bill that this defendant was not a party to the proceedings referred to in the said Bill of Complaint heretofore pending in this Court.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill, this Defendant doth demand the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and prays to be hence dismissed, with his costs and charges, in his behalf, most wrongfully sustained.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitors for Defendant.*

I hereby certify that in my opinion, the foregoing demurrer of George W. Fairbank, to the Bill of Complaint of The Alton Water Company, Complainant, is well founded in law, and is proper to be filed in the above cause.

JAMES HAMILTON LEWIS AND
E. N. ZOLINE,
*Solicitor- for George W. Fairbank.*

*Affidavit of George W. Fairbank.*

UNITED STATES OF AMERICA,
*In the Southern District of Illinois:*

COMMONWEALTH OF MASSACHUSETTS,
*County of Suffolk, ss:*

George W. Fairbank, the defendant, on oath states that he has read the foregoing demurrer to the Bill of Complaint of The Alton Water Company in this suit, and that the said — is not interposed for the purpose of delaying said suit or any proceeding therein.

GEORGE W. FAIRBANK.

Subscribed and sworn to before me this 4th day of October, A. D. 1907.

[SEAL.] FRANK E. BRADBURY,
*Notary Public.*

106 Afterwards, to-wit, on the 3rd day of October, in the June Term of said Court, in the year aforesaid, the following further proceedings were had in said Court in said cause, and entered of record to-wit:

*Order of October 3, 1907.*

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner.

It is ordered by the Court that the time for certain parties who appear to have been served by copy of order of this Court advising

them of the filing of the bill in the above cause, to file their appearance either general or special or file such pleadings as they may elect as to jurisdiction of the Court or otherwise be extended 40 days from date or until otherwise ordered thereafter after the lapse 40 days.

107 *Judgment.*

In the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

In Chancery.

Monday, *November* 25, *A. D.* 1907.

Present: Hon. J. Otis Humphrey, District Judge:

Alton Water Company

vs.

Allen A. Brown, Trustee; Robert B. Wason, Harriet N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Dromgoole, C. H. Venner Co., and Cidele Venner.

This matter having come on this day to be heard upon the motion of the complainant, for a preliminary injunction restraining certain defendants from proceeding with their suit at Madison County Circuit Court as prayed for in the said bill of complaint, and the demurrers of the defendants Charles M. Page, Harriet N. Houghton, Wm. B. Trask, George W. Fairbanks, Robert B. Wason, Orrin Warrent, James Schoulder, James Hamilton Lewis, and Elijah N. Zoline, to the said bill of complaint, and the Court having heard the arguments of counsel and being fully advised in the premises, hereby orders, adjudges and decrees that the motion of the com-

108 plainant for a preliminary injunction be and is hereby denied, and that the said demurrer be and is hereby sustained, and the Court further orders that said bill of complaint of the Alton Water Company, be and is hereby dismissed for want of jurisdiction, at the cost of complainant.

It is therefore ordered and adjudged by the Court that the defendants receive of the complainant their costs and charges by them about their defense in this behalf expended and that execution issue therefor.

On motion of complainant an appeal to the United States Circuit Court of Appeals for the Seventh Circuit is allowed complainant on entering into bond to defendant in penalty of five hundred dollars in thirty days.

109

*Petition for Appeal.*

Filed Dec. 23, 1907.

In the Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Complainant, Appellant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants, Respondents.

The above named complainant, the Alton Water Company, conceiving itself aggrieved by the decree entered on November 25th, 1907, in the above entitled cause, doth hereby appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, and it prays that its appeal may be allowed, and that a transcript of the record, proceedings and decree in said cause, duly authenticated may be sent to the aforesaid United States Circuit Court of Appeals.

And said complainant files herewith its assignment of errors in said cause.

LEVI DAVIS,
*Solicitor for Complainant and Appellant,*
*The Alton Water Company.*

WM. BURRY,
*Of Counsel.*

Indorsed: Filed December 23, 1907. James T. Jones, Clerk.

110 *Assignment of Errors.*

Filed Dec. 23, 1907.

Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Complainant, Appellant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants, Respondents.

Assignment of Errors.

And now comes the complainant and appellant, the Alton Water Company, and in connection with its petition for an appeal, says that in the record and decree aforesaid error has intervened to its prejudice, and this complainant and appellant here assigns the following errors, to-wit:

1. The Circuit Court of the United States for the Southern District of Illinois erred in overruling complainant's motion for a preliminary injunction.

2. Said Circuit Court erred in not granting said injunction.

3. Said Circuit Court erred in sustaining the demurrers to complainant's bill.

4. Said Circuit Court erred in dismissing said bill.

111 5. Said Circuit Court erred in rendering said decree dismissing said bill.

Wherefore the said Alton Water Company, by reason of the errors aforesaid prays that said decree may be reversed and said cause remanded to said Circuit Court with directions to overrule said demurrers and to grant said injunction.

LEVI DAVIS,
*Solicitor for Appellant.*

WM. BURRY,
*Of Counsel.*

Indorsed: Filed—December 23, 1907. James T. Jones, Clerk.

Then afterwards to-wit on said twenty third day of December in the June term of said Court in the year last aforesaid the following further proceedings were had in said Court in said cause and entered of record to-wit:

*Order of Dec. 23, Allowing Appeal.*

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, JAMES SCHOULDER et al.

Now on this 23rd day of December 1907 being one of the judicial days of the June term 1907 of this Court, comes the complainant the Alton Water Company by its solicitor and presents its petition for an appeal from the decree entered herein on November 25, 1907 to the United States Circuit Court of Appeals for the Seventh Circuit, together with an assignment of errors; it is therefore ordered by the Court that said appeal be and is hereby allowed complainant on filing herein within thirty days from this date its bond in the penal sum of $500.00 payable to the defendants and conditioned to prosecute said appeal to effect and answer all costs if it fail to make good said appeal; and the order made herein on November 25, 1907 granting the complainant an appeal on entering into bond within thirty days from that date is hereby annulled and set aside.

112 Then afterwards, to-wit, on the 22nd day of January in the January term of said Court in the year of our Lord one thousand nine hundred and eight the following further proceedings were had in said Court in said cause and entered of record to-wit:

*Order of Jan. 22, 1908, Extending Time to File Appeal Bond.*

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, JAMES SCHOULDER et al.

On motion of complainant by Levi Davis Esq., its solicitor the time of complainant to file its appeal bond herein is extended until Tuesday March 10th 1908.

Afterwards to-wit, on the 7th day of March in the Year of our Lord one thousand nine hundred and eight, came again the complainant, by Levi Davis, Esq., its solicitor and filed in the Clerk's Office of said court, its petition for writ of error and assignment of erro-s, which are as follows—to-wit:

113 *Petition for Writ of Error.*

Filed Mar. 7, 1908.

Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Complainant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Hooughton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbanks, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Dromgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The abovr named complainant, the Alton Water Company, conceiving itself aggrieved by the decree entered on November 25th, 1907, in the above entitled cause, doth hereby appeal from said decree to the United States Circuit Court of Appeals, for the Seventh Circuit, and it prays that its appeal may be allowed, and that a transcript of the record, proceedings and decrees in said cause, duly authenticated may be sent to the aforesaid United States Circuit Court of Appeals. And said complainant files herewith its assignment of errors in said cause.

LEVI DAVIS,
*Solicitor for Complainant and Appellant, the Alton Water Company.*

WM. BURRY,
*Of Counsel.*

(Indorsed:) Filed—March 7, 1908—Jas. T. Jones, Clerk.

114 *Assignment of Errors.*

Filed Mar. 7, 1908.

Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Complainant, Appellant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquahar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants, Respondents.

Assignment of Errors.

And now comes the complainant and appellant, the Alton Water Company, and in connection with its petition for an appeal, says that in record and decree aforesaid error has intervened to its prejudice, and this complainant and appellant here assigns the following errors, to-wit:

1. The Circuit Court of the United States for the Southern District of Illinois erred in overruling complainant's motion for a preliminary injunction.

2. Said Circuit Court erred in not granting said injunction.

3. Said Circuit Court erred in sustaining the demurrers to complainant's bill.

4. Said Circuit Court erred in dismissing said bill.

115 5. Said Circuit Court erred in rendering said decree dismissing said bill.

Wherefore the said Alton Water Company, by reason of the errors aforesaid prays that said decree may be reversed and said cause remanded to said Circuit Court with directions to overrule said demurrers and to grant said injunction.

LEVI DAVIS,
*Solicitor for Appellant.*

WM. BURRY,
*Of Counsel.*

(Indorsed:) Filed—March 7—1908—James T. Jones, Clerk.

*Bond.*

Filed Mar. 7, 1908.

Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Appellant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of William Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Respondents.

Know all men by these Presents, That we, the Alton Water Company and George M. Ryrie and Charles A. Caldwell all of the City of Alton, in the County of Madison and State of Illinois, are held and firmly bound unto the above named Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, James Schoulder,
116 C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the estate of William Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, in the sum of Five Hundred Dollars, to be paid to the said Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the estate of William Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 7th day of March in the year of our Lord One thousand nineteen hundred and eight.

Whereas, the above named the Alton Water Company has prosecuted an Appeal to the United States Circuit Court of Appeals for the Seventh Circuit to reverse the decree rendered in the above en-

titled suit, by the — Circuit Court of the United States for the Southern District of Illinois:

Now, therefore, the condition of this obligation is such that if the above named the Alton Water Company, shall prosecute said appeal to effect and answer all — costs if it fail to make good said appeal, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ALTON WATER CO.,
[L. S.] By GEO. M. LEVIS, *Its President.*

Attest:

SAMUEL WADE, *Secretary.*

GEORGE M. RYRIE. [SEAL.]
CHARLES A. CALDWELL. [SEAL.]

117 *Certificate of Notary Public.*

Sealed and delivered and taken and acknowledged this 7th day of March, 1908, before me Lewis M. Carr, a notary public within and for the County of Madison and State of Illinois.

[L. S.] LEWIS M. CARR,
*Notary Public.*

*Affidavit of Geo. M. Ryrie and Charles A. Caldwell.*

STATE OF ILLINOIS,
*County of Madison, ss:*

George M. Ryrie and Charles A. Caldwell both of the city of Alton in the county and state aforesaid whose names are signed to the within appeal bond being first duly sworn, each for himself states that he is the owner in fee of unincumbered real estate in the said county of Madison of the value of more than five thousand dollars over and above all exemptions and that he owns in his own right personal estate of a value exceeding Five thousand dollars and that the same is free from all liens and incumbrances.

GEO. M. RYRIE.
CHARLES A. CALDWELL.

Subscribed and sworn to before me, a notary public in and for said county in the state aforesaid this 7th day of March A. D. 1908.

[L. S.] L. M. CARR,
*Notary Public.*

(Indorsed:) Filed March 7, 1908 James T. Jones, Clerk.

118 *Order of Mar. 7, 1908, Allowing Appeal.*

Afterwards, to-wit, on the seventh day of March in the January term of said Court in the year of our Lord one thousand nine hundred and eight the following further proceedings were had in said Court in said cause and entered of record to-wit:

In Chancery.

ALTON WATER COMPANY
*vs.*
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, JAMES SCHOULDER, et al.

This day comes the complainant by Levi Davis Esq., its solicitor and presents to the Court its petition for appeal from this Court to the United States Circuit Court of Appeals for the Seventh Circuit, and an assignment of errors being filed with said petition as required by the rules of said Circuit Court of Appeals it is ordered by the Court that said appeal be allowed. Complainant at same time presents its bond on appeal in penalty of $500.00 conditioned as the Law directs which bond is approved by the Court and ordered to be filed.

Then afterwards, to-wit: on the eighteenth day of January, in the year of our Lord one thousand nine hundred and nine, a Mandate from the United States Circuit Court of Appeals for the Seventh Circuit was filed in the office of the Clerk of the Circuit Court, of the United States, for the Southern District of Illinois, Southern Division, which mandate is as follows, to-wit:—

119 UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Southern District of Illinois, Southern Division, Greeting:

Whereas, lately in the Circuit Court of the United States for the Southern District of Illinois, before you, or some of you, in a cause between The Alton Water Company and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, et al., the decree entered on the twenty fifth day of November A. D. 1907, is in the words and figures following, to-wit:

This matter having come on this day to be heard upon the motion of the complainant, for a preliminary injunction restraining certain defendants from proceeding with their suit at Madison County Circuit Court as prayed for in the said bill of complaint, and the demurrers of the defendants Charles M. Page, Harriet N. Houghton, Wm. B. Trask, George W. Fairbanks, Robert B. Wason, Orrin War-

ren, James Schoulder, James Hamilton Lewis, and Elijah N. Zoline, to the said bill of complaint, and the Court having heard the arguments of counsel and being fully advised in the premises, hereby orders, adjudges and decrees that the motion of the complainant for a preliminary injunction be and is hereby denied, and that the said demurrer be and is hereby sustained, and the Court further orders that said bill of complaint of the Alton Water Company, be and is hereby dismissed for want of jurisdiction, at the cost of complainant.

It is therefore ordered and adjudged by the Court that the defendants receive of the complainant their costs and charges by them about their defense in this behalf expended and *123* that execution issue therefor.

On motion of complainant an appeal to the United States Circuit Court of Appeals for the Seventh Circuit is allowed complainant on entering into bond to defendant in penalty of five hundred
120 dollars in thirty days.

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Seventh Circuit by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the Term of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order or decree of the said Circuit Court appealed from be, and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Circuit Court with direction to overrule the several demurrers to the bill and proceed thereunder in accordance with the opinion of this Court.

Tuesday, October 6, 1908.

And afterwards, to-wit, on the second day of November, A. D. 1908, there was filed in the office of the Clerk of this Court, a Petition for rehearing, which petition for rehearing was on the twenty-fourth day of November A. D. 1908, denied.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States the twelfth day of January, in the year of our Lord one thousand nine hundred and nine.

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

(Indorsed:) Filed January 18, 1909. James T. Jones, Clerk.

12—75

121 Afterwards, to-wit, on said eighteenth day of January in the January Term of said Court, in the year last aforesaid, the following proceedings were had in said Circuit Court of the United States for the Southern District of Illinois, and entered of record, to-wit:

In the Circuit Court of the United States, Southern District of Illinois, Southern Division.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN et al.

On this day came the complainant and presented to the Court a mandate in this cause from the United States Circuit Court of Appeals for the Seventh Circuit, which was filed, and this cause was ordered restored to the docket of this court,

And on motion of complainant and proof of due notice of said motion, it was ordered that the order and decree entered herein on the 25th day of November, A. D. 1907, be and the same is hereby set aside and annulled;

And on like motion and notice, it was further ordered that all the demurrers filed herein be heard instanter, and the court, after considering said demurrers to the bill of complaint now on file, overruled the same;

And thereupon, on like motion and notice, it was further ordered that all the defendants who have appeared or been served herein, answer or plead to the bill of complaint on or before the fifteenth day of February, 1909:

And upon like motion and notice, it was further ordered that until further order of the court, each and all of the defendants herein, and their attorneys, counsellors and agents, be and they are hereby enjoined and restrained from further prosecuting the suit brought by them or some of them on or about June 10, 1907, in the

122 Circuit Court of Madison County, Illinois, against the complainant and others to foreclose the mortgage trust deed from the Boston Water & Light Company to the International Trust Company, as trustee, dated in October, 1897, and recorded in that month in the recorder's office in Madison County, Illinois, in book 253 of records at page 82, and a supplement to said last mentioned mortgage trust deed dated November 1, A. D. 1897, and recorded in said recorder's office in book 257 of records at page 1; and that they and each of them also be enjoined from prosecuting any appeal from or writ of error to any final order or decree entered in said last mentioned suit, except to move for a continuance thereof; and also from instituting or prosecuting any other suit in any other court for the foreclosure of said mortgage trust deed from the Boston Water & Light Company to the International Trust Company and said supplement thereto; all upon said complainant filing herein an injunction bond in usual form in the sum of two thousand dollars with surety to be approved by the Clerk.

And afterwards, to-wit, on the first day of February in the year last aforesaid, come again the complainant by its solicitors and filed in the Clerk's Office of said Court, its Injunction Bond to the defendants in penalty of two thousand dollars, which bond is as follows, to-wit:

Know all men by these presents: That we, the Alton Water Company, as Principal and Geo. M. Ryrie and C. A. Caldwell, as Sureties, of the City of Alton in the County of Madison and State of Illinois, are held and firmly bound unto Allen A. Brown, trustee, Robert B. Wasson, Harriet N. Houghton, James Schoulder, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, executors of the estate of William Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquahar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, who are hereinafter, for convenience, 123 referred to as "the said defendants," in the sum of Two Thousand Dollars, to be paid to the said defendants, their executors, administrators, successors or assigns, for which payment well and truly to be made, we bind ourselves jointly and severally and our respective heirs, executors and administrators and successors, firmly by these presents.

Sealed with our seals, and dated this 22nd day of January A. D. 1909.

Whereas, the above bounden Alton Water Company has filed its bill of complaint in the Circuit Court of the United States for the Southern District of Illinois, against the above named, the said defendants praying for an injunction to restrain the said defendants from further prosecuting the suit brought by them or some of them on or about the 10th day of June A. D. 1907, in the Circuit Court of Madison County in the State of Illinois, against the above bounden Alton Water Company and others to foreclose the mortgage trust deed from the Boston Water and Light Company to the International Trust Company, as trustee, dated in October A. D. 1897, and recorded in that month in the recorder's office in Madison County, Illinois, in book 253 of records at page 82, and a supplement of said mortgage trust deed dated the first day of November A. D. 1897, and recorded in said recorder's office in book 257 of records at page 1, and also from instituting or prosecuting any other suit in any other court for the foreclosure of said mortgage trust deed from the Boston Water and Light Company to the International Trust Company and said supplement thereto and praying for other and further relief;

And whereas, the said Circuit Court of the United States for the Southern District of Illinois has allowed an injunction for said purposes and also restraining the said defendants and each of them from prosecuting any appeal from or writ of error to any final order or decree entered in said suit brought by said defendants or some of them in the Circuit Court of said Madison County, Illinois, as afore-

said, except to move for a continuance thereof, all according
124 to the prayer of said bill so filed by the above bounden Alton Water Company as aforesaid, upon said Alton Water Company giving bond with surety as required by the order of said Circuit Court of the United States for the Southern District of Illinois, granting said injunction.

Now, therefore, the condition of the above obligation is such, that if the above bounden Alton Water Company, their executors, administrators or successors, or any of them, shall and do well and truly pay or cause to be paid to the said defendants all such costs and damages as shall be awarded against the said complainant, the Alton Water Company, in case the said injunction shall be dissolved, then the above obligation to be void; otherwise to be and remain in full force and virtue.

[SEAL.]

ALTON WATER COMPANY.
By GEO. M. LEVIS, *President.*
GEO. M. RYRIE.
C. A. CALDWELL.

Attest:

SAMUEL WADE, *Secretary.*

Indorsed: Filed February 1, 1909—Jas. T. Jones, Clerk.

Then afterwards, to-wit: on the fourth day of February in the year last aforesaid, the following further proceedings were had in said Court in said cause and entered of record, to-wit:

In the Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Plaintiff,
vs.
ALLEN A. BROWN et al., Defendants.

125 *Order.*

Upon the stipulation of the parties herein filed in this cause, it is hereby ordered by the Court that the answer of the respective defendants herein, or such defendants as may desire to file an answer to the bill of complaint herein, may be signed for the respective defendants by Mr. Elijah N. Zoline as their attorney, and that the signature or signatures of such defendants to such answer or answers, is and are hereby waived.

*Stipulation.*

In the Circuit Court of the United States for the Southern District of Illinois.

THE ALTON WATER COMPANY, Plaintiff,
vs.
ALLEN A. BROWN et al., Defendants.

It is stipulated and agreed by and between the respective parties hereto through their attorneys, that the answer of the defendants hereto, or so many of such defendants as may desire to file an answer to the bill of complaint herein, may be signed by Mr. Elijah N. Zoline, one of the attorneys for the respective defendants herein; and that the signature or signatures of the respective defendants to such answer is hereby waived.

LEVI DAVIS &
WM. BURRY,
*Attorneys for Plaintiff.*
JAMES HAMILTON LEWIS &
ELIJAH N. ZOLINE,
*Attorneys for Defendants.*

Dated Chicago, February 3, 1909.

Indorsed: Filed February 4, 1909. Jas. T. Jones, Clerk.

126 Afterward, to-wit, on the eleventh day of February in the year last aforesaid, came again the defendants, Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wasson, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, and George W. Fairbank by Messrs. James Hamilton Lewis and Elijah N. Zoline, their solicitors and filed their joint and several answers to the bill of complaint herein, which answer is as follows, to-wit:

127 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. HOUGHTON, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

The Joint and Several Answer of Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriett N. Houghton, Charles M. Page, James Schouler, and George W. Fairbank, Defendants, to the Bill of Complaint of The Alton Water Company, Complainant.

1. These defendants reserving to themselves all right of exception to the jurisdiction of this court as a federal court over the subject-matter herein and over the persons of these defendants, but
128 expressly insisting that this honorable court is without jurisdiction as a federal court over the subject-matter herein and over the persons of these defendants for the various reasons hereinafter set forth for answer to the bill of the said Alton Water Company say:

2. They admit that the Alton Water Company is a corporation organized and existing under the laws of the State of Illinois and located and doing business at the City of Alton in the County of Madison and State of Illinois. They deny that the bill filed by the complainant herein is an ancillary bill, but on the contrary aver that the bill so filed is an original bill against these defendants. They admit that the citizenship of these defendants and the other defendants mentioned in the bill of complaint herein is correctly stated and that none of these defendants or any one of the defendants herein is an inhabitant of the Southern District of Illinois and within the jurisdiction of this court.

3. And these defendants admit that on or about the 17th day of November, 1900, the Farmers' Loan and Trust Company, a corporation, filed a bill in equity in the Circuit Court of Madison County, in the State of Illinois, against the New England Water Works Company, the Alton Water Works Company, the American Loan and Trust Company, trustee, the United Water Works Company, Limited, the Boston Water and Light Company, the International Trust

Company, trustee, Charles A. Caldwell, trustee, Anson M. Lyman, trustee, and the unknown owners and holders of ten promissory notes of $5,000 each, dated June 5, A. D. 1900, signed by the New England Water Works Company, payable to the order of
129 Anson M. Lyman and secured by certain chattel mortgage of the said New England Water Works Company to Anson M. Lyman, trustee, but deny that the contents of that bill and the prayer of that bill were as set forth in the bill of complainant herein, the Alton Water Company.

4. And further answering these defendants allege that in order to show the true contents of said bill they hereby attach a true and correct copy of said bill to this answer, and mark same Defendants' Exhibit "A," and make same a part of this answer, for all purposes of defense on the part of these defendants as hereinafter appears. And these defendants aver that they had no notice, knowledge or information of the filing of the said bill in said Madison County Circuit Court, and that they did not discover that their rights had been violated, and their property taken without a hearing, and without due process of law, until the 27th day of April, 1905, when they filed objections to the confirmation of sale in the Circuit Court of the United States for the Southern District of Illinois, expressly challenging the jurisdiction of this court to sell the property described in said trust deed of the Boston Water and Light Company to the International Trust Company and relating to the water plant and system of the said Boston Water and Light Company, as well as franchises of the last named company, in the Village of Upper Alton, and averring that said property is being taken from these defendants without due process of law and that the decree was in the nature of a confiscation of their property, contrary to law and
130 without notice. And these defendants aver that their aforesaid objections were, on May 5, 1905, stricken out on motion of the complainant, the Farmers' Loan and Trust Company, and held for naught by this court.

5. And these defendants further answering say that they had no knowledge or information of the filing of the bill of complaint by the United Water Works Company, Limited, as set forth in paragraph 5 of the bill of complaint herein; and had no notice or information of the order entered on November 30, 1900, by the Madison County Circuit Court, consolidating the suit of the United Water Works Company, Limited, vs. the Alton Water Works Company, et al., with the said suit of the Farmers' Loan and Trust Company vs. the New England Water Works Company, et al., brought in the same court. And these defendants deny that the aforesaid consolidated causes were ordered by said Madison County Circuit Court to be removed to the Circuit Court of the United States for the Southern District of Illinois, and on the contrary thereof aver that the order of removal which was entered on January 7, 1901, by the said Madison County Circuit Court covered only the removal of the cause of the said Farmers' Loan and Trust Company suit, and not the creditor's bill of the United Water Works Company, Limited, against

the New England Water Company. And these defendants say that they were not parties to any of the aforesaid proceedings and are not bound by same. And further answering, these defendants aver that it does not appear from the bill of complaint of the Alton Water Company, the complainant herein, why and upon what fed-
131 eral ground the said cause was removed to the Circuit Court of the United States for the Southern District of Illinois, or that there were any legal grounds justifying said removal of the cause and that it does not appear upon what legal authority the Circuit Court of the United States of the Southern District of Illinois as a federal court, took jurisdiction of same. And these defendants now and at all times deny that the said Circuit Court of the United States for the Southern District of Illinois as a federal court, ever lawfully obtained jurisdiction over the subject-matter and the parties of the said consolidated causes or any or either of said causes and of the parties to same by said removal from the Madison County Circuit Court of the State of Illinois to this court as aforesaid.

6. And these defendants further answering aver that the jurisdiction in this court resting wholly upon the diversity of citizenship, there was not in said removed cause such diversity of citizenship as to make the aforesaid suit a removable case under the statutes of the United States, in that the Farmers' Loan and Trust Company, complainants therein, and the United Water Works Company, one of the defendants to the bill of the said Farmers' Loan and Trust Company, trustee, were both at the time of filing of said bill citizens of the same state, to wit: the State of New York, and that there was not in said cause a controversy wholly between citizens of different states and which could be fully determined as between them, but that there was in that case substantially but one controversy to which all of the defendants were parties. That the necessary
132 diversity of citizenship to give the said Circuit Court jurisdiction was not shown by the petition for removal therein to exist at the time of bringing that suit and at the time of removal thereof, a copy of which petition is herewith attached marked Defendants' Exhibit "B," and made part of this answer.

7. And further answering. these defendants allege that this Honorable Court could not legally take jurisdiction of the cause so removed as aforesaid because there being in that cause no other ground of jurisdiction than diversity of citizenship alleged and claimed, such requisite diversity of citizenship did not in fact exist as to make this cause a removable cause and because there was no separate controversy between citizens of different states therein which could be fully determined as between them.

8. That this Honorable Circuit Court had no jurisdiction of said cause in this, that had the said cause been otherwise removable upon the ground of diversity of citizenship, no other cause for removal existing under the statutes, such removal could only have been made by all the parties defendant to this controversy uniting in such application; whereas, the same was made solely by the Boston Water

and Light Company, which alone filed a petition for such removal, no other party or parties to said suit joining in such petition.

9. And as further cause why this Honorable Court was without jurisdiction to hear and determine the aforesaid cause so removed to this court, these defendants aver that the said cause was not removable, because the Alton Water Works Company was a party
133 to said suit and should have joined in the petition for removal, and that said Alton Water Works Company, at the time of the bringing of the said suit and at the time of the said removal, was a citizen of the State of Illinois and not entitled under the statutes of the United States to petition to remove into the said Circuit Court of the United States for the Southern District of Illinois, the case having been brought against it in the courts of the State of Illinois.

10. And further answering why said removal was illegal, these defendants aver that the said removed cause was not and is not a cause cognizable in the Circuit Courts of the United States under the statutes of the United States, nor properly removable from the state court into the said Circuit Court of the United States for the Southern District of Illinois.

11. And these defendants, further answering, aver that the record in said removed cause shows that said litigation was inaugurated on June 13, 1900, by the filing of a creditor's bill by the said United Water Works Company, Limited, a corporation organized under the laws of the State of New York, in the Circuit Court of Madison County, Illinois, on the 13th of June, 1900, to which the New England Water Works Company, a corporation organized under the laws of the State of Rhode Island, was sole defendant therein; that on the same day the complainant filed an amendment to the bill making the Alton Water Works Company, a corporation organized under the laws of Illinois; the Farmers' Loan and Trust Com-
134 pany, a corporation organized under the laws of New York; the American Loan and Trust Company, a corporation organized under the laws of Massachusetts; Anson M. Lyman, a citizen of the State of Massachusetts, and Chas. A. Caldwell, a citizen of the State of Illinois, parties defendant thereto; that the citizenship of the various parties is not stated in the amendment to the said bill, but appears in the aforesaid removal petition; that on the next day, June 14, 1900, one Truman A. Taylor was appointed receiver by the Madison County Circuit Court and took possession; that thereafter, on November 17, 1900, the aforesaid bill of the Farmers' Loan and Trust Company referred to in the bill of complaint herein was filed in the same state court, and to that bill were made defendants the New England Water Works Company, a corporation of the State of Rhode Island; the said Alton Water Works Company, a corporation of Illinois; the said American Loan and Trust Company, a corporation of the State of Massachusetts; the United Water Works Company, Limited, a corporation of New York; the Boston Water and Light Company, a corporation organized under the laws of the State of Maine; the International Trust Company, trustee, a corporation

organized under the laws of Massachusetts; Chas. A. Caldwell, trustee, a citizen of Illinois, and Anson M. Lyman, trustee, a citizen of Massachusetts, and also the unknown owners of the promissory notes secured by the chattel mortgage from the New England Water Works Company to Lyman. That on the 30th of November, 1900,
an order was entered by the Circuit Court of Madison County
135 consolidating the cases of the United Water Works Company,
Limited, against the New England Water Works Company with the suit brought by the Farmers' Loan and Trust Company against that company; that by the same order it was provided that said Taylor should be appointed receiver in the consolidated cause. That on the 4th of January, 1901, the Boston Water and Light Company, after filing in said Madison County Circuit Court its answer, denying all the material allegations of the bill of the said Farmers' Loan and Trust Company, filed the aforesaid petition for the removal of this consolidated cause into the Circuit Court of the United States for the Southern District of Illinois, alleging a controversy in that suit between the petitioner, the Boston Water and Light Company, a corporation of the State of Maine, and the complainant, the Farmers' Loan and Trust Company, which could be fully determined as between these parties; and on that petition an order was entered on January 7, 1901, removing the aforesaid foreclosure suit of the Farmers' Loan and Trust Company, a copy of which order is herewith attached and marked Defendant's Exhibit "C," and made a part of this answer. And these defendants aver that the Boston Water and Light Company, after answering the aforesaid bill in the said state court, could not, under the law, petition the court to remove said cause, and that said order of removal was and is illegal and conferred no jurisdiction upon this Honorable Court in said cause.

12. And these defendants, further answering, aver that the aforesaid record discloses no separable jurisdictional controversy
136 between the Boston Water and Light Company and the
Farmers' Loan and Trust Company or the other parties thereto; for the reason that, at most under the issues framed by said bill, the litigation between the Farmers' Loan and Trust Company, the Boston Water and Light Company and the International Trust Company involved nothing more than an accounting between said last named parties with a view of ascertaining whether there was a diversion of the funds belonging to the pumping station mortgaged by the Alton Water Works Company into the new plant of the Village of Upper Alton constructed by the Boston Water and Light Company and covered by the mortgage to the International Trust Company, trustee; that no issue of adverse title to real estate could, as a matter of law, be raised in an ordinary foreclosure suit, nor was such an issue of fact presented by the said bill of complaint of the said Farmers' Loan and Trust Company (referred to in the bill of complaint herein), said bill of the said Farmers' Loan and Trust Company merely praying and having for its objects the ascertain-

ment of the priorities of the different lienholders referred to in said bill.

13. And these defendants, further answering, relating to aforesaid removal of the cause, aver that in the said case of the United Water Works Company, Limited, against the New England Water Works Company, which was consolidated in said state court, the Farmers' Loan and Trust Company was made a party defendant; that the order of removal does not cover said cause of the said United Water Works Company; that treated as a separate case, there
137 was in that case a controversy between the complainant therein, a citizen of the State of New York, and among other defendants the Farmers' Loan and Trust Company, one of such defendants, also being a citizen of the State of New York; that therefore this court was without jurisdiction as federal court to hear and determine same. That as neither the Boston Water and Light Company nor the International Trust Company were named as defendants to that bill, said cause treated as a separate case, could not be removed upon the allegation of any separable controversy existing between the complainant and either of these parties last named.

14. And these defendants, further answering, aver that inasmuch as this Honorable Court was without jurisdiction to hear and determine said consolidated cause so removed as aforesaid all proceedings had therein, including the decrees entered therein in said bill as set forth in the bill of complaint of the Alton Water Company, the complainant herein, are null and void; that therefore the present suit of the Alton Water Company, the complainant herein, cannot be predicated or based upon any such void decree or decrees entered in said suit so removed; that the bill of complaint herein cannot be treated as an ancillary suit or a continuation of the said cause or causes. And these defendants now and at all times aver that this Honorable Court as a federal court is without jurisdiction as a federal court over the subject-matter and the parties to the present suit instituted by said Alton Water Company; that the complainant has no standing in this court as a federal court; that it has no
138 valid title to the property described in said decree and sold pursuant thereto, and that if the present suit cannot be predicated upon the aforesaid decrees, which defendants allege are void and without jurisdiction. These defendants aver that the jurisdiction to issue the injunction prayed for in the bill of complaint herein is denied and prohibited by Section 720 Revised Statutes of the United States, which expressly prohibits the federal courts to issue injunctions to restrain proceedings in said state courts; and these defendants hereby challenge the jurisdiction of this court as a federal court to hear and determine the subject-matter of this cause and denies the jurisdiction of this court as a federal court over these defendants, and aver that said suit of the said Alton Water Company is in every aspect of the case an original case against these defendants and is not ancillary to any of the proceedings had, as set forth in the said bill of complaint of the complainant herein.

15. And these defendants, further answering, aver that at the time of the filing of the suit in the Madison County Circuit Court,

to wit: on the 17th day of November, 1900, by the said Farmers' Loan and Trust Company vs. the aforesaid New England Water Works Company, the Boston Water and Light Company, the International Trust Company, trustee, there were and now are in full force and effect in the State of Illinois the following laws and constitutional enactments:

Par. 19 of Art. II of the Bill of Rights of the constitution of the State of Illinois, adopted in convention May 13, 1870, ratified by the People of the State of Illinois July 2, 1870, and in force August 8, 1870, provides as follows:

"SEC. 19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay."

That paragraph 2 of the said constitution of Illinois provides:

"No person shall be deprived of life, liberty or property without due process of law."

That the General Assembly of the State of Illinois, in harmony with the above mentioned paragraph of the constitution of Illinois, and in order to protect unknown owners or parties in their rights, has provided a method of bringing such unknown owners or parties into court and to afford them an opportunity to be heard respecting their interest in the property in dispute. That on March 15, 1872, the said legislature of the State of Illinois passed a law which became in force July 1, 1872, and known as Par. 7 of Chap. 22 of the Chancery Act of the State of Illinois, in words and figures as follows, to wit:

"SEC. 7. Unknown Parties—Affidavit—Notice.] SEC. 7. In all suits in chancery, and suits to obtain title to lands in any of the courts of this state, if there be persons interested in the same, whose names are unknown, it shall be lawful to make such persons parties to such suits or proceedings, by the name and description of unknown owners, or unknown heirs or devisees of any deceased persons who may have been interested in the subject-matter of the suit previous to his or her death; but in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown; and process shall be issued against all parties, by the name and description given as aforesaid; and notices given by publication, as is required in this act, shall be sufficient to authorize the court to hear and determine the suit, as though all parties had been sued by their proper names."

That the Supreme Court of the State of Illinois in the following adjudicated cases, to wit:

McGraw v. Bayard, 96 Ill., 147;
Gates v. Franklin Savings Bank, 85 Ill., 256;
St. Louis Brewing Association v. Geppart, 95 Ill. App., 187;
Scanlan v. Cobb, 85 Ill., 300;
Clark v. Manning, 95 Ill., 580;
General Fire Extinguisher v. Lundell, 66 Ill. App., 143;
Chandler v. Ward, 188 Ill., 322,

has construed the aforesaid section of the statute to apply to all holders of notes and bonds who may be unknown to the complainant, which are secured by a trust deed or a mortgage in the State of Illinois, and that the law of the State of Illinois, as rule of property and an absolute right, requires that such holders of notes or bonds so secured by trust deeds or mortgages shall be brought into court and made parties defendant to a suit to foreclose or affect their interest in real estate in Illinois in the manner provided and pointed out by said statute. And these defendants hereby refer to the printed official reports of the said Supreme Court of the State of Illinois, wherein the above mentioned cases are reported in full, and prays that said adjudicated cases may be treated as part of this answer, as if
141 same had been expressly incorporated herein. That said constitutional provisions and statutes of Illinois were in full force and effect at the time of the execution of any and all of the trust deeds referred to in the said bill of complaint of said The Farmers' Loan and Trust Company and at the time of the execution of the trust deed by the Boston Water and Light Company to the International Trust Company, trustee, to wit: on October 1, 1897, and became by operation of law part of and incorporated into the said trust deed of the Boston Water and Light Company to the International Trust Company, and became a rule of property and part of the contract between the Boston Water and Light Company, the International Trust Company and its bondholders, amongst whom are these defendants; and as a matter of law it became obligatory and necessary to join these defendants as indispensable parties defendant to the above mentioned suit of the Farmers' Loan & Trust Co. v. The New England Water Works Co., the Alton Water Works Co., Boston Water and Light Co., the International Trust Co. et al., before any decree could be made operative against the rights and equities of these defendants. Nevertheless, these defendants aver that the complainant in said suit, to wit: the said Farmers Loan and Trust Company, has not made these defendants, or any other bondholder of the said Boston Water and Light Company, parties defendants to said suit, although it filed said suit in a court of the State of Illinois, to wit: in the Madison County Circuit Court, in the State of Illinois,
142 and was bound by all the rules of pleadings and practice in said court, and although it well knew that the International Trust Company was the mere naked trustee, had no interest in the property covered by said trust deed of the Boston Water and Light Company, to said International Trust Company; that the bondholders under the last named trust deed were and are the only real parties in interest and were to be seriously affected by any decree that it may obtain regarding the water plant and property of Upper Alton, Illinois, and although it well knew that said International Trust Company had no authority as a matter of fact or law to represent these defendants in the aforesaid proceedings. And these defendants aver that they were not brought into court by publication or otherwise, as provided by the laws of Illinois.

And these defendants, further answering, aver that said constitutional enactments of the State of Illinois, said statutes and decisions

of the Supreme Court of Illinois, are binding upon all persons in the land, as a rule of property, and are equally binding upon the courts of the United States; that these defendants are entitled to the benefit of and to the protection of their contract rights as aforesaid, and to the right to be heard in court before the said property upon which they have a lien, which was created and paid for with the money realized from the sale to them of the aforesaid bonds issued under said trust deed to said International Trust Company, as more fully appears in this answer, could be legally taken away from these defendants and other holders for value of such bonds. And
143 these defendants aver that by taking the property from these defendants in manner and form as set forth in the bill of complaint herein of the complainant, the Alton Water Company, and as set forth in this answer the rights of these defendants were violated within the meaning of the constitution of the United States of America; and these defendants, as their defense to this action, ask this Honorable Court to give these defendants the benefit and application of Section 10 of Article I of the constitution of the United States of America, and ask this court to hold under said constitutional provision of the United States that the aforesaid constitutional provisions of the State of Illinois, statutes of said state, and the decisions of the Supreme Court of Illinois, constitute a contract as hereinbefore set forth, and is a substantial right, and are binding upon all persons in the land, including the courts of the United States and this Honorable Court.

16. And these defendants, as part of their defense to this action, aver that their property was taken by the decrees of this court and sale thereunder *as* in manner and form as set forth in the bill of complaint herein of the Alton Water Company, the complainant, without due process of law, contrary to the Fifth and Fourteenth Amendments of the constitution of the United States of America. And they, these defendants, now ask this Honorable Court to give them the benefit of the aforesaid federal constitutional provisions and to apply the last named constitutional provisions of the constitution of the United States of America to this case, and to
144 hold that the property of these defendants described in the trust deed of the Boston Water and Light Company, upon which they have a lien by virtue of the bonds held and owned by them, secured by said trust deed to the International Trust Company, trustee, as set forth in this answer, was taken from them by said decrees of this court and sale thereunder without due process of law within the meaning of said Fifth and Fourteenth Amendments of the constitution of the United States of America; and these defendants ask this Honorable Court to hold that said decrees are of no force and effect and that the complainant, because of the aforesaid constitutional provisions of the United States, is not entitled to the relief in the premises as prayed in its bill of complaint herein.

17. And these defendants further answering respectfully represent unto this honorable court that by an ordinance passed by the board of trustees of the Village of Upper Alton, Illinois, in November, 1898, and amended December 27, 1898, the Boston Water and

Light Company, a corporation, in consideration of a public service to be performed by it for the benefit of the inhabitants of the Village of Upper Alton and as a public service corporation, was granted the exclusive right and privilege to lay down, continue and maintain water pipes, etc., for the conveyance and distribution of water along certain streets and through public places in the Village of Upper Alton, Illinois, for the supply of said village and inhabitants thereof, as more fully will appear from the ordinances themselves, which are attached his answer and are marked "Defendants' Exhibit
145 D," and made part of this answer. That under these ordinances the Boston Water and Light Company proceeded to erect the necessary water plant in said village, and for the purpose of raising the necessary funds to carry out the provisions of the said ordinances, as well as to erect and pay for its pumping station and filter plant and other property, it created an issue of 200 first mortgage bonds, in the sum of $1,000 each, and secured the same by deed of trust on all its property and franchises to the said International Trust Company, trustee. That by Section 24 of the last named deed of trust the power and duty of the trustee was expressly limited to certifying the bonds as of the series mentioned therein, and that the trustee shall not in any event, have any duty or responsibility as to the validity thereof, or the security thereby afforded, unless the trustee is requested by a bondholder to foreclose the trust deed in case of default in the performance of the covenants of said trust deed. Of these bonds so issued by the Boston Water and Light Company and secured by the said deed of trust to the International Trust Company and covering the new pumping station and the franchises granted to the said Boston Water and Light Company by the Village of Upper Alton, and the plant built pursuant thereto, which are more particularly described in the said deed of trust, an amount equal to $125,000 par value, were issued and sold in the open market, and these defendants, Robert B. Wason, Orrin Warren, Wm. B. Trask, Harriett N. Houghton, Chas. M. Page, James Schouler and Geo. W. Fairbank, and other parties, bought the same in good faith
146 at about par; and the water plant was duly installed, completed and paid for with the money realized out of the sale of these bonds, and from no other source whatever; and that at the time of the said decree in the case of the Farmers' Loan and Trust Company vs. Alton Water Works Company et al., and at the time of the sale thereunder, and at all times since, the said property and franchises of the Boston Water and Light Company were and have been worth more than $125,000. And these defendants hereby submit to this honorable court a list of bondholders and their respective holdings under the trust deed of the said International Trust Company, as follows:

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| $56,000. | The C. H. Venner Company, a New Jersey corporation, owner and pledgor. Cidele Venner, of New York, pledgee, Nos. 19-20, 34, 38-41, 51-60, 71-90, 107-125. |
| $12,000. | Allen A. Brown, trustee, Boston, Massachusetts, Nos. 7-10, 42-49. |
| $10,000. | Robert B. Wason, Boston, Massachusetts, Nos. 91-100. |
| $10,000. | Mrs. Harriet N. Houghton, Brookline, Massachusetts, Nos. 61-70. |
| $10,000. | James Schouler, Boston, Massachusetts, Nos. 5, 28-30, 50, 101-105. |
| $5,000. | Wm. H. Sumner, Belfast, Maine, Nos. 21-25. |
| $4,000. | C. A. Damon, Boston, Massachusetts, Nos. 1-4. |
| $2,000. | James Howe, Charlestown, Massachusetts, Nos. 17, 36. |
| $2,000. | Joseph C. Foster, Salem, Massachusetts, Nos. 14, 33. |
| $2,000. | Orrin Warren, West Newbury, Massachusetts, Nos. 16, 18. |

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| $2,000. | Chas. M. Page, Albany, New York, and |
| $1,000. | Mrs. Alice G. Page, Philadelphia, Pennsylvania, Nos. 11-13. |
| $1,000. | Estate of Benjamin F. Dudley, John Farquhar, administrator, Boston, Massachusetts, No. 27. |
| $1,000. | Geo. W. Fairbank, Cochituate, Massachusetts, No. 15. |
| $1,000. | M. C. Grier, Boston, Massachusetts, No. 31. |
| $1,000. | Miss Sabra Hodgkins, Boston, Massachusetts, No. 26. |
| $1,000. | Geo. F. Lovett, Melrose, Massachusetts, No. 106. |
| $1,000. | Vernon Prouty, Spencer, Massachusetts, No. 32. |
| $1,000. | Wm. B. Trask, Erie, Pennsylvania, No. 35. |
| $1,000. | Mary A. Evans, New Dorp, Staten Island, New York, No. 37. |
| $1,000. | Frank Droomgoole, Mount Kisco, New York, No. 6. |
| $125,000. | Total outstanding issue. |

18. And these defendants further answering deny that the trust deed or mortgage of the Alton Water Works Company to the Farmers' Loan and Trust Company or to said Caldwell was or is in any way whatever a lien upon the property of the Boston Water and Light Company and its water plant and franchises in the Village of Upper Alton or covers or embraces the new pumping works constructed by the said Boston Water and Light Company, or upon any of the water mains connecting said pumping works with the water works system in the City of Alton upon any theory whatever.

148 19. And these defendants aver, that all of said new pumping works, machinery, power or pumping plant was constructed by the Boston Water and Light Company and was at all times the property of said Boston Water and Light Company, subject only to said trust deed to the International Trust Company, made by it to secure the series of bonds created by said trust deed and which bonds, as heretofore enumerated, are owned and held by the respective bondholders.

20. And these defendant-, further answering, state the fact to be that said Boston Water and Light Company at all times was and is the sole owner of the water mains connecting said new pumping works with the water plants or reservoirs and stand-pipes aforesaid and also, all of the water mains laid in the Village of Upper Alton, and that said real estate upon which said new water works are situated was purchased by said Boston Water and Light Company with its own money in the year 1897, and the new pumping works, together with the filters therein and the machinery therein (except said large pump) and said water mains from said new pumping works to said water tank and said water mains in the Village of Upper Alton and several miles of water mains laid in said City of Alton, were acquired, built, constructed, installed and put in by said Boston Water and Light Company with money created out of the sale of the bonds issued by said company and secured by the trust deed to the International Trust Company as aforesaid, and not with any money whatever of said Alton Water Works Company,
149 its successors or assigns, or any of the earnings of the property or works of said Alton Water Works Company, its successors or assigns. That said real estate last above mentioned was purchased from one Catherine Armstrong by said Boston Water and Light Company in the year 1897, the said Catherine Armstrong being at that time in possession and seized in fee of the same. That the deed for said real estate was made by said Catherine Armstrong to Truman A. Taylor, who thereupon conveyed by deed from himself and wife the said real estate to said Boston Water and Light Company, which last named company thereupon entered into possession of said real estate and erected said new pumping works thereon and purchased and laid the water mains and said water tanks and purchased and laid said water mains in the Village of Upper Alton; the said water mains so laid in said village having been laid under a franchise or right granted by said ordinances of said village to said Boston Water and Light Company.

And these defendants, further answering, aver that in addition to the property and franchises acquired by the Boston Water and Light Company, as heretofore described, the latter company did also, on the 12th day of December, 1898, for a valuable consideration, procure from John E. Hayner and Mary Hayner, his wife, who were then and there the owners of the land hereinafter described in the Village of Upper Alton, Illinois, the right to *lain* and maintain a line of water mains in and along the strip of land hereinafter described. Said strip of land is described as follows:

"Said strip of land being in the northeast quarter of Sec-
150 tion Ten (10), in Township Five (5), North, Range Ten (10), West of the Third Principal Meridian, in the City of Alton aforesaid, and described as follows, to wit: Beginning at a stone set for the quarter section corner between Sections Ten (10) and Eleven (11), in said township and range, running thence north eighty-nine and a half degrees west (N. 89½° W.) along the line between the north and south halves of said Section Ten (10), fifteen hundred and ninety (1,590) feet to a point; thence north four (4)

feet to a point; thence south eighty-nine and a half degrees east fifteen hundred and ninety (1,590) feet to a point in the line between said Sections Ten (10) and Eleven (11); thence south on said line four (4) feet to the place of beginning."

And these defendants aver that said property was and is the absolute property of the said Boston Water and Light Company, save the rights reserved by the said grantors, Haynie and wife, by their said deed, and that said property in no respect can be or is after acquired property of the said Alton Water and Light Company. That said deed was duly acknowledged by said Haynie and wife and recorded in the Recorder's office of said Madison County, Illinois, on the 9th day of June, 1900, at 8 o'clock a. m., in book 271 of Records, page 428, in accordance with the laws of the State of Illinois, in such cases made and provided.

21. These defendants further answering say that the deed so made by said Catherine Armstrong to said Truman A. Taylor bears date the 3d day of September, A. D. 1897, and is recorded in the recorder's office of Madison County, in the State of Illinois, under date of the 11th day of October, A. D. 1897, in Book 256 of Records, on
151 page 347, and that the said deed from said Truman A. Taylor and wife to said Boston Water and Light Company bears date the 7th day of October, A. D. 1897, and is recorded in the recorder's office of Madison County, State of Illinois, under date of October 11, A. D. 1897, in Book 256 of Records on page 348.

22. And these defendants further answering deny that any water mains laid in the Village of Upper Alton were ever laid by said Alton Water Works Company, its successors or assigns, or with any money derived from the sale of bonds secured by the trust deed of the Alton Water Works Company to the Farmers' Loan and Trust Company, or from the earnings of said original old Alton Water Works plant, and deny that the said Alton Water Works Company or its successors ever had any title or equitable ownership in any or either of the property or franchise of the Boston Water and Light Company.

23. And these defendants further answering admit that the International Trust Company, trustee, filed its answer in the said suit of the Farmers' Loan and Trust Company vs. the New England Water Works Company, et al., as set forth in paragraph 6 of the bill of complaint herein. But these defendants aver that they did not authorize said trustee to file said answer or any answer whatever and that they had no notice or information whatever of the filing of said answer, or of the pendency of the said suit; and aver that the said International Trust Company, trustee, had no authority to represent these defendants in the said suit of the Farmers' Loan and
152 Trust Company vs. the New England Water Works Company, et al., which authority to represent these bondholders has been expressly withheld from it by Section 24 of the said trust deed of the Boston Water and Light Company to the International Trust Company. Said provision relating to the authority of the trustee is in words and figures as follows, to wit:

"The trustee hereunder shall not in any event have any duty or responsibility as to the validity hereof or the security hereby afforded,

nor as to the execution, acknowledgment, recording or renewal hereof, nor (unless said trustee is called upon to take active measures to enforce the security by foreclosure or otherwise, with due indemnity) as to the indemnity, taxes or repairs, or any other matters affecting the security; and in general it is understood that prior to being called upon their sole duty is confined to certifying bonds as of the series mentioned herein."

24. And these defendants further answering aver that they at no times waived the benefit of the statute of the State of Illinois as heretofore set forth; that the interest of the International Trust Company, trustee, in the property conveyed to it in trust, has been and is, merely nominal; and that these defendants and other bondholders of the Boston Water and Light Company were and are the only real parties in interest to be affected by any suit that was or may be brought as an attack against the title or interest in property described and secured by the said trust deed of the said Boston Water and Light Company to the International Trust Company.

25. These defendants admit that the Farmers' Loan and Trust Company filed its replication to said answer of the Interna-
153 tional Trust Company as set forth in paragraph 8 of the bill of complaint herein, and that evidence was taken in said consolidated suits, but deny that the evidence justified the entry of the decree or decrees aforesaid, and admit that a decree was entered by this court on the 23d daay of December, 1903, as set forth in paragraphs 8, 9 and 10 in said bill of complaint herein of the Alton Water Company, the complainant herein, but aver that all of the aforesaid proceedings were without jurisdiction and without notice to these defendants and are wholly void for these and other reasons set forth in this answer and that said decrees are not in any way binding upon these defendants.

26. And these defendants further answering aver that said decree of this court, entered on December 23, 1903, and the decree of this court, entered on May 5, 1905, confirming the sale had pursuant to the said original decree of December 23, 1903, are each of them wholly void for the further reason that the pleadings in the said removed case did not confer jurisdiction upon this Honorable Court to enter the aforesaid decree of December 23, 1903, in manner and form as same was entered and made and as stated in the bill of complaint herein, because said decree is wholly outside and in excess of the issues made and presented in this court in said case or consolidated cases between the parties litigant, to wit: the Farmers' Loan and Trust Company and the Boston Water and Light Company and the International Trust Company, trustee. And more specifically these defendants aver that there is no averment in the said bill of complaint of the Farmers' Loan and Trust Company filed in
54 Madison County Circuit Court on November 17, 1900, that the franchises or ordinances of the Village of Upper Alton, Illinois, passed in November, 1898, as amended November 30, 1908, and December 27, granting to the Boston Water and Light Company the exclusive right and privilege to lay down, continue and

maintain water pipes, valves, hydrants and other apparatus for the conveyance and distribution of water in, upon, along and through its streets, avenues, alleys and other public places of the Village of Upper Alton, and additions thereto, and to supply with the water the said village and the inhabitants thereof (as from said ordinance heretofore pleaded, more fully appear), was ever the property of the Alton Water Works Company, or is or could be after acquired property of the said Alton Water Works Company, said grant being a personal one to a different public service corporation in consideration of a public service to be performed by the latter corporation, viz: the Boston Water and Light Company, nor is there a prayer in said bill to subject such franchise ordinances to the foreclosure of the mortgage of the said Farmers' Loan and Trust Company executed to it by the Alton Water Works Company. Yet, nevertheless, the said decree of foreclosure entered by this Honorable Court on December 23, 1903, directs the sale of said franchises of the Boston Water and Light Company to satisfy the said mortgage or trust deed of the said Alton Water Works Company to the Farmers' Loan and Trust Company, and in direct terms orders the sale of "also the franchise or privilege obtained in the name of the Boston Water and Light Company for laying and operating in Upper Alton
155 the water mains and water works connected with and drawing water from the system of water works hereinbefore described."

27. And these defendants further answering aver that said decree is outside of the issues made as aforesaid in this that there was no allegation or prayer in said bill of the Farmers' Loan and Trust Company to subject to and order for sale any choses of action belonging or standing in the name of the Boston Water and Light Company, yet the aforesaid decree orders the sale and takes from the Boston Water and Light Company, "also all rents, dues, demands and choses in action of every kind and nature, including water rents from Alton, Upper Alton and private consumers arising from said water works system, with the right to collect the same."

28. That the said bill of complaint of the Farmers' Loan and Trust Company in paragraph 9 of same avers on information and belief the following:

"Since the making of said trust deed to your orator the said mortgaged property has been extended and enlarged and particularly there have been laid water mains and water pipes in connection with said original water works extending east from the City of Alton into East Alton or Upper Alton and several miles of water mains have been there laid which are supplied with water only through and from the water mains of said water works which were in operation at the time of the making of said trust deed to your orator. And your orator shows that said additional water mains were purchased and laid with money derived from the sale of the bonds secured by said trust deed to your orator and the earnings of said original water works plant, as your orator is informed and believes. There
156 has also been built and installed a new pumping station on the bank of the Mississippi River about a mile above the pumping

works in operation at the time said trust deed to your orator was made. Much of the machinery, especially the large pump which was in use in said old pumping station, and which is under the lien of said trust deed to your orator, has been by said Boston Water and Light Company, or the New England Water Works Company, moved from said old pumping works to said new pumping works and now forms a large and effective part of said new pumping works, and without it said pumping works could not supply the water needed, and the pump so taken from said old pumping works is the pump that is now forcing water through all of said water works plant. Such removal was made fraudulently and for the purpose of attempting to remove said machinery from the lien of the trust deed to your orator, and it is still in the hands of the parties so removing it. And your orator states further, on information and belief, that the money used to acquire the property on which said new pumping works are situated and to build said new pumping works came from the earnings of the water works property so mortgaged to your orator."

That Section 15*f* of said bill prays for an accounting with the Boston Water and Light Company, as follows:

"Your orator charges, on information and belief, that a large amount of moneys pledged to your orator was used and expended in erecting said new pumping works, and said New England Water Works Company has also paid to said Boston Water and Light Company large amounts of moneys in the form of so-called rental and dividends upon the capital stock of said Boston Company, which should be applied upon the cost of erecting said new pumping works.

And your orator is therefore entitled to an accounting with
157 said Boston Water and Light Company as to the amount so paid it" (p. 31 of bill).

All of which allegations were denied by the respective defendants to said bill.

That the aforesaid decree of this court of December 23, 1903, in so far as it relates to the issues between the Farmers' Loan and Trust Company and the Boston Water and Light Company and International Trust Company, trustee, regarding the property and water plant of the Village of Upper Alton, is not in any way responsive to the allegations of the said bill of the Farmers' Loan and Trust Company, or any of the pleadings therein, for the following additional reasons, to wit:

(*a*) Inasmuch as all of the allegations pertaining to the said property and water plant of the Village of Upper Alton were made by the Farmers' Loan and Trust Company upon information and belief, the only issue of fact thus created and to be tried is whether or not the complainant, the Farmers' Loan and Trust Company, had so been informed and believed, and does not put in issue any fact or facts pleaded in said bill regarding the equities of said property.

(*b*) That the allegations of the said bill of the Farmers' Loan and Trust Company, and the prayer thereof, being merely in the nature of a bill for an accounting as aforesaid between the Farmers' Loan

and Trust Company and the Boston Water and Light Company and the International Trust Company, trustee; yet, the decree aforesaid of December 23, 1903, does not order an accounting as prayed
158 for in said bill, and does not find that any amount whatever was wrongfully diverted from the earnings of the original plant of the old Alton Water Works Company in the City of Alton into the water plant built by the Boston Water and Light Company in the Village of Upper Alton, and does not order any specific amount to be paid by the Boston Water and Light Company or the International Trust Company, its trustee, to relieve the property and water system in the Village of Upper Alton from the charge thus made by the bill, to wit: the wrongful diversion of the funds. That instead, the said decree orders the said Boston Water and Light Company, the International Trust Company, trustee, to pay over to the master in chancery of this court the entire indebtedness contracted by the Alton Water Works Company as found by the master under the original mortgage of the Water Works Company to the Farmers' Loan and Trust Company. That this Honorable Court, under the aforesaid issues, was without jurisdiction to enter the decree aforesaid in the manner and form as aforesaid, and that for the same reasons, and for the reasons heretofore stated, and other good and sufficient reasons, this Honorable Court was at all times without jurisdiction to hear and determine the aforesaid matter; and was at all times without jurisdiction to enter the decree on May 5, 1905, confirming the sale had pursuant to the aforesaid decree of December 23, 1903.

29. And these defendants, further answering, respectfully represent that the aforesaid decree of the Circuit Court of the United States for the Southern District of Illinois at the suit of the
159 Farmers' Loan and Trust Co. v. The New England Water Works Co., the Boston Water and Light Co., the International Trust Co., et al., as referred to in the bill of complaint of the complainant, the Alton Water Company, is void, and ought not to be recognized in any court within the dominion of the United States of America, or elsewhere, for the reason that at the time of the execution of the trust deed by the Alton Water Works Company to the said Farmers' Loan and Trust Company, to wit: on or about December 27, 1886, and at the time of the recording of same on January 8, 1887, in the office of the clerk of the Circuit Court of said Madison County, the said Farmers' Loan and Trust Company was not authorized by the laws of the State of Illinois, and had no license to do business in the State of Illinois, as provided by the laws of the State of Illinois.

That the said Farmers' Loan and Trust Company is a corporation organized under the laws of the State of New York for the purpose of accepting trusts and for other purposes. That prior to and at the time of the filing of its aforesaid bill in the Madison County Circuit Court, the said Farmers' Loan and Trust Company did a general trust business throughout the State of Illinois, maintaining agencies in the various part- of the state, and acting as active trustee in said state. And these defendants aver that said Farmers' Loan and Trust Company had not, prior to the filing of the above suit in the Mad-

ison County Circuit Court, which was subsequently removed to the Circuit Court of the United States for the Southern District
160 of Illinois, complied with the laws of Illinois, requiring a deposit with the auditor of public accounts of $200,000 in stocks of the United States or municipal bonds of the State of Illinois, or in mortgages on improved or productive real estate in Illinois, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon, as provided by the statutes of Illinois, reference being made to an act of the General Assemly of the State of Illinois, entitled, "An Act to provide for and regulate the administration of trusts by trust companies, approved June 15, 1887, in force July 1, 1887.

30. And these defendants aver that in the case of the said Farmers' L. and T. Co. v. The Lake St. Elevated R. R. Co., the Supreme Court of Illinois, on June 18, 1898, judicially found and adjudicated that the said Farmers' Loan and Trust Company is a corporation organized under the laws of the State of New York for the purpose of doing a general trust business and for other purposes, and had not at any time complied with the laws of Illinois relating to foreign corporations, and in relation to trust companies and was not entitled to act as trustee in the State of Illinois, which case is reported in the official Supreme Court reports of the State of Illinois in Vol. 173 Ill. of said reports, at pages 439 to 460, inclusive, and these defendants hereby beg leave to refer to said case in said printed official reports and that same may be considered as part of this answer in the same manner as if the same had been specifically incorporated
161 herein.

31. And further answering, these defendants aver that they are not bound by any of the proceedings stated in the said bill of complaint of the Alton Water Company, complainant herein, in the aforesaid suit of the Farmers' Loan and Trust Company, and are not bound by any answer or representations in the aforesaid suits on the part of the International Trust Company, trustee, for the reason that it had no authority to represent these defendants, and for the further reason that these defendants themselves had the right to look after their own interests. And further answering, aver that said trustee had full notice and information regarding the names and addresses of the bondholders under said deed of trust and that therefore it was the duty of the said International Trust Company, as trustee, to suggest to the court the names of these defendants as the owners and holders of the bonds secured by the trust deed of the said Boston Water and Light Company to it as trustee, and to request the court to order the complainant in said foreclosure suit to bring these defendants into court; and that it was further the duty of the said International Trust Company to advise these defendants of the pendency of the said suit, and that the failure of said International Trust Company to so advise these defendants of the pendency of said suit, and for the protection of the rights of these defendants in the aforesaid litigation, constitutes a fraud upon the rights of these defendants, and that the conduct of the said trustee in that par-

ticular is fraudulent and ought to be set aside, and be of no binding force and effect as against the rights of these defendants.

162 32. And these defendants, further answering aver that they have no information relating to the alleged default in the payment of sums of money found due under the said trust deed to said Caldwell and said Farmers' Loan and Trust Company, respectively, as set forth in paragraph 11 of said bill, and admit that the property described in said decree was, against their protest, on the 18th day of April, 1905, sold by a master in chancery, as set forth in said paragraph 11, and that a deed was issued to Samuel Peck, G. Ralph Laighton, Charles G. Sanford and Russell Frost, and that said sale was confirmed by the court. But these defendants aver that said sale is wholly void and of no binding force and effect upon these defendants for the reasons heretofore set forth.

33. And these defendants admit that on the 30th day of March, 1906, the Alton Water Company, complainant herein, purchased all of the property conveyed under the aforesaid decree to the said Samuel Peck, G. Ralph Laighton, Charles G. Sanford and Russell Frost, and received from them a deed conveying said property. But these defendants aver that the said conveyance, for the reasons aforesaid, is wholly void and in no way binding upon these defendants, because the said Alton Water Company is not an innocent purchaser without notice, but is a purchaser pendente lite*m*. That prior to the purchase of the aforesaid property by the said complainant from Samuel Peck, G. Ralph Leighton, Charles G. Sanford and Russel Frost, the aforesaid last named parties did on the 16th day

163 of April, 1906, file a petition in this court against James Hamilton Lewis, one of the defendants herein, praying that said Lewis be cited and punished for contempt of this court for violating the injunctional decree of this court entered on May 5, 1905 (heretofore mentioned, which decree also confirmed the sale as aforesaid), said violation of the said injunctional decree on the part of Lewis consisting in the filing of a bill in the Madison County Circuit Court, Illinois, on 24th day of March, 1906, on behalf of these defendants and other bondholders of the Boston Water and Light Company to foreclose the property covered by the said trust deed of the said Boston Water and Light Company to the International Trust Company, trustee, which bill is substantially in form the same kind of a bill as it is sought now to be enjoined in the present suit of the Alton Water Company, the complainant herein; that on the 16th day of April, 1906, the said Lewis was found guilty of contempt of this court as charged in said petition and sentenced to sixty days' imprisonment in the county jail of Sangamon County, Illinois; that from said judgment the said Lewis prosecuted a writ of error to the Circuit Court of Appeals of the United States for the Seventh Circuit, and the latter court at the January session 1907, reversed said judgment against Lewis on the ground that this court had no jurisdiction over the persons of these defendants and said Lewis, as their attorney, and that this court was without jurisdiction to enter said decree of injunction as from the opinion of the said

court will more fully appear, reference thereto being had as
164 reported in Volume 154 Federal Reports, at page 273, entitled Lewis v. Peck; and these defendants hereby plead said opinion and judgment of the said Court of Appeals for every purpose of their defense to this action that may be in any way material to the issues in this cause, and make said decision of said Court of Appeals part of this answer in the same manner as if same had been expressly herein incorporated.

34. And these defendants, further answering, aver that shortly after the aforesaid decision by the said Court of Appeals in the said case of Lewis v. Peck the suit referred to in the bill of complaint herein was refiled in the Madison County Circuit Court, Illinois, and that the complainant, the Alton Water Company, had full and due notice of the rights of these defendants and of their determination to prosecute their suit to secure redress of their said just grievances with relation to the property conveyed in trust by said Boston Water and Light Company to the International Trust Company to secure the bond issue thereby created; and these defendants aver that the said Alton Water Company purchased said property on March 30, 1906, six days after the filing by these defendants of their aforesaid bill of foreclosure in Madison County Circuit Court, Illinois, with full notice of the rights of these defendants.

35. And these defendants, further answering, aver that in addition to the objections filed by these defendants and others to the confirmation of the aforesaid sale as heretofore herein alleged, these defendants prior to and at the sale of said property by the
165 master in chancery of this court to said Samuel Peck, G. Ralph Leighton, Charles G. Sanford and Russel Frost, in the presence of said purchasers and their attorneys, caused a notice of protest to be read asserting their rights to the property and franchises of the Boston Water and Light Company and denying the jurisdiction of the court to order and make said sale in so far as it relates to the property of the said Boston Water and Light Company in the Village of Upper Alton and covered by said trust deed to said International Trust Company.

36. And these defendants, further answering, admit that about the 10th day of June, 1907, after the reversal by said Court of Appeals of the judgment of this court finding said Lewis guilty of contempt of court, Allen A. Brown, trustee, Robert B. Wason, Harriet W. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Chas. N. Page, Geo. W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. T. Trask and Mary A. Evans by James Hamilton Lewis, their solicitor, and Elijah N. Zoline, of counsel, filed their certain bill of complaint in the Circuit Court of Madison County in the State of Illinois against the Boston Water and Light Company, the International Trust Company, Geo. W. Sumner and Chester B. Sumner, executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice G. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, Geo. F. Lovett, Vernon

Prouty, Frank Drumgoole, C. H. Venner Company, Cidele Venner, Samuel Peck, G. Ralph Laighton, Chas. G. Sanford, Russell
166 Frost, said Alton Water Company praying for the foreclosure of the aforesaid mortgage made by the Boston Water and Light Company to the International Trust Company and the appointment of a receiver for the property mentioned and described therein and that process from said Circuit Court of Madison County has been issued and served upon said Alton Water Company to appear and answer to said bill; and admit that said mortgage deed from said Boston Water and Light Company to said International Trust Company is set out substantially in full in said last mentioned bill of complaint, and admit that in and by said bill of complaint so filed in said Circuit Court of Madison County, it is alleged that the complainants therein and the other defendants hereinafter named (excepting said James Hamilton Lewis and Elijah N. Zoline), for full consideration and in open market became possessed of one hundred and twenty-five thousand dollars ($125,000) of bonds secured by said mortgage trust deed made by the Boston Water and Light Company to said International Trust Company as aforesaid, and that said complainants and other holders of the bonds described in said trust deed are the only real parties in interest other than said Boston Water and Light Company having any valid claim to the property created and owned by said Boston Water and Light Company at Alton and Upper Alton, in the State of Illinois, and mortgaged or intended to be by said trust deed, and that said bonds together with interest thereon remain wholly unpaid and unsatisfied, and
167 because of the default in the payment of interest on said bonds said complainants have elected to declare the whole amount due upon said bonds together with interest and charges thereon to be payable immediately; and that in the said trust deed and agreement between the International Trust Company and the Boston Water and Light Company and particularly under paragraph 24 it was provided that the said trustee should have no duty or responsibility of the said trust deed or the things therein contained for the security thereby afforded, nor unless said trustee is called upon to take active measures to enforce the security by foreclosure is it to seek indemnity and that it was specifically provided in said paragraph 24 that prior to the said trust company being called upon to foreclose the security its sole duty is confined to certifying the aforesaid bonds as of the series mentioned; and that they, the said complainants, and each of them, have duly demanded of the International Trust Company that the said trust company foreclose the said mortgage upon the property therein referred to for and in behalf of said complainants, but that the said trust company for reasons satisfactory to itself declined to take such action and that said complainants are informed that the said trust company is not by law called upon to do anything further or other than that which has been done heretofore by it looking towards collection of the interest upon the said bonds and therefore the said trust company declined to take action looking to the foreclosure

of the said mortgage and trust deed in behalf of and for said
168 complainants; that there has been default in the payment of the said interest upon all the bonds described in said mortgage or trust deed for the years 1902, 1903, 1904 and 1905, and it therefore becomes necessary for said complainants to seek relief in a court of equity and seek the foreclosure of said trust deed and such other proceedings as shall be necessary to applying the said property named in the said deed of trust, the proceeds thereof, to the payment of the bonds and claims of said complainants; and that it is meet and advisable that the said property described in the said trust deed be at once seized and taken possession of by said Circuit Court of Madison County to the end that the incomes, rents and issues be conserved and that a receiver or other custodian be named by the court to take charge of the said property and conserve its issues, rents and profits pending the controversy over the same and pending the foreclosure of the said trust deed for and in behalf of said complainants, and that it is meet and appropriate in equity that the said property be adjudged the property of the said Boston Water and Light Company duly pledged to the International Trust Company for the security of said complainants and other holders of said bonds situated as they are, and that the said property be brought into court by due process and adjudged to be the security for the bonds owned by said complainants and others, and that the said trust deed be foreclosed and that, after due hearing of the parties herein, an order of sale of said
169 property be made ordering the said property to be sold in order that the proceeds from the same shall be applied to the payment of the complainants as bondholders and of such persons as may be similarly situated as they are; and that Samuel Peck, G. Ralph Laighton, Chas. G. Sanford, Russell Frost and some unknown parties have or claim to have some interest in the said mortgaged premises or some part thereof as purchasers, mortgagees, judgment creditors or otherwise, which interests, if any, have accrued subsequent to the lien of the said mortgage of complainants and are subject thereto.

37. That the respective interests of these defendants are fully set out in said bill so filed in the Madison County Circuit Court by these defendants et al., as shown by "Exhibit C" attached to the bill of the complainant hereto, and by the list of bondholders heretofore referred to in this answer, which bill is hereby made a part of the answer of these defendants, as if same was attached as an exhibit to this answer.

38. And these defendants, further answering, deny that they are acting in collusion with any of the parties as set forth in paragraph 15 of the said bill of complaint, and for the purposes set forth in said paragraph 15 of the bill of complaint, and aver that the entire allegation of said paragraph 15 is wholly immaterial and irrelevant, and has no bearing upon the case, and as to that particular paragraph these defendants ask the same advantage as if they had specially demurred to same.

And these defendants, further answering, deny that the complain-

ant herein is entitled to any relief in the premises, or any
170 part thereof, and pray that they may be henceforth dismissed with their costs and charges most wrongfully sustained.

ALLEN A. BROWN,
SABRA HODGKINS,
MARY A. EVANS,
ROBERT B. WASON,
ORRIN WARREN,
WILLIAM B. TRASK,
HARRIET N. HOUGHTON,
CHARLES M. PAGE,
JAMES SCHOULER,
GEORGE W. FAIRBANK,
By E. N. ZOLINE, *Their Attorney.*

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,
*Attorneys for Allen A. Brown, Sabrah Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairbank.*

171 DEFENDANTS' EXHIBIT "A."

STATE OF ILLINOIS,
*County of Madison, ss:*

In the Circuit Court of Madison County.

To the Honorable Judges of said Court in Chancery sitting:

Your orator, the Farmers' Loan and Trust Company, trustee, a corporation organized and existing under the laws of the State of New York, brings this, its bill of complaint against the New England Water Works Company, a corporation organized and existing under the laws of the State of Rhode Island; the Alton Water Works Company, a corporation organized and existing under the laws of the State of Illinois; the American Loan and Trust Company, trustee, a corporation organized and existing under the laws of the State of Massachusetts; the United Water Works Company, Limited, a corporation organized and existing under the laws of the State of New York; the Boston Water and Light Company, a corporation organized and existing under the laws of the State of Maine; the International Trust Company, a corporation organized and existing under the laws of the State of Massachusetts; Charles A. Caldwell, trustee; Anson M. Lyman, trustee, and the unknown owners and holders of ten promissory notes of five thousand dollars ($5,000) each, dated June 5, A. D. 1900, signed by the New England Water Works Company, payable to the order of Anson M. Lyman, and secured by a
172 chattel mortgage from said New England Water Works Company to Anson M. Lyman, trustee, dated June 5, A. D. 1900,

and recorded in book one of chattel mortgages at page 136 in the recorder's office of Madison County, Illinois.

And thereupon your orator complains and says that:

1. Your orator is a corporation duly created by the laws of the State of New York and is fully authorized and empowered to hold in trust the property conveyed to it in trust as hereinafter fully stated and to execute the trusts imposed on it under and by virtue of the mortgage or deed of trust hereinafter described.

2. The said Alton Water Works Company is a corporation organized under the laws of the State of Illinois for the purpose of constructing, building and operating water-works generally, and especially to acquire, operate and maintain water-works in the city of Alton in said Madison county and the vicinity; to supply and furnish water to the city of Alton and the inhabitants and also to do a general plumbing business.

3. On or about May 28, A. D. 1877, said Alton Water Works Company duly executed and delivered its certain mortgage or deed of trust conveying to Charles A. Caldwell, trustee, all its property to secure its issue of bonds not to exceed seventy-five thousand dollars ($75,000) of principal; of which said bonds there were, at the date of the deed of trust to your orator hereinafter referred to, outstanding and duly executed and issued by the said Alton Water
173 Works Company bonds aggregating forty-six thousand dollars ($46,000) of principal. Said Charles A. Caldwell subsequently died and his son, Charles A. Caldwell, of Alton was duly appointed trustee in his stead and is now acting as such. And your orator attaches to this bill of complaint, as Exhibit "A," a true copy of said trust deed to said Caldwell and prays reference thereto with like effect as if the same were herein set forth at length.

4. On or about January 1, A. D. 1887, said Alton Water Works Company, being thereunto by law duly authorized, did duly execute and deliver to your orator its certain bonds, dated that day, each for the sum of one thousand dollars ($1,000), aggregating the sum of two hundred thousand dollars ($200,000) of principal, payable at your orator's office in New York City, on January 1, A. D. 1907, and bearing interest at the rate of six per centum (6%) per annum payable at the said office of your orator semi-annually on the first days of July and January in each year; said interest payments being further evidenced by coupons attached to said bonds. Upon each of said bonds there was a certificate by your orator stating that said bond was one of the series referred to in the trust deed hereinafter mentioned; all of which, by the said bonds and each of them and the certificates thereon to which your orator for greater certainty refers, will more fully and at large appear.

5. On or about December 27, A. D. 1886, the said Alton Water
174 Works Company, to secure the payment of its last mentioned bonds, being thereunto duly authorized, executed, acknowledged and delivered to your orator as trustee its certain mortgage or deed of trust, bearing date on or about that date, therein and thereby conveying and transferring to your orator, as trustee, all the privileges, franchises, estates, property both real and personal,

effects and assets which it then owned or at any time thereafter might acquire, and including particularly its water-works property in the city of Alton and vicinity. Said deed of trust was and is the proper act and deed of said Alton Water Works Company by it authorized, made and delivered in all respects in conformity with law, and is a valid conveyance for the purposes therein stated; and the trusts therein and thereby created were duly accepted by your orator before said deed of trust was recorded. Said deed of trust was duly recorded in the office of the clerk of the Circuit Court of said Madison county on January 8, A. D. 1887, in book 179 of records, at page 365, and is in words and figures following, to-wit:

This Indenture, made this first day of January, A. D. 1887 by and between the Alton Water Works Company, a corporation organized under the laws of the State of Illinois, and having its principal office at the City of Alton, Illinois, party of the first part, and the Farmers' Loan and Trust Company of the City of New York, a corporation organized under the laws of the State of New York, and having its principal office at the said City, County, and State of New York, as trustee, party of the second part:

175 Witnesseth, that whereas the said party of the first part is a corporation organized under the laws of the State of Illinois, for the purpose of constructing, building, and operating water works generally, but especially to operate, maintain and extend water works in the said City of Alton, Madison County, Illinois, so as to supply and furnish water to the said City of Alton, and to all persons living in said city, and also to do a general plumbing business:

And whereas, the said party of the first part is now and for several years last past has been engaged in owning, operating, and extending a system of water works in said City of Alton, Illinois, by which the said City of Alton and the inhabitants thereof are furnished and supplied with water, and the only system of water works in said City of Alton so owning and operating said system of water works is the owner, as a part thereof, of reservoirs, pump-house, machinery, mains, pipes, hydrants, fixtures, appliances, apparatus, and this estate real and personal rights, privileges, franchises, choses in action and assets hereinafter more particularly described:

And whereas the said party of the first part is desirous of borrowing the moneys mentioned in the resolutions hereinafter set forth, and of making and issuing the bonds in said resolutions mentioned, for the purposes therein set forth:

And whereas the said party of the first part has the power and is authorized by law to borrow said sum of money and to make, issue and deliver the said bonds, and to make, issue and deliver the mortgage of its property, real and personal, rights, privileges,

176 franchises, choses in action and assets for the purpose of securing the payment of the said bonds, principal and interest:

And whereas, by the laws in force in the State of Illinois, the power to borrow said sum or sums of money, and to make, issue and

deliver its said bonds and mortgage, is vested in the Board of Directors of said corporation:

And whereas, the Board of Directors of said corporation at a regular meeting thereof, held at the office of said corporation in the said City of Alton, Illinois, on the 27th day of December, A. D. 1886, unanimously adopted the following resolutions, viz:

Whereas, heretofore, towit: on the 28th day of April, A. D. 1877, the Alton Water Works Company made its 510 bonds in the aggregate promising to pay the sum of $75,000 with 6 per cent. interest, payable semi-annually, as expressed in said bonds, of which 424 promising to pay the sum of $55,200 in the aggregate were issued and delivered;

And whereas, on the said last named day to secure the payment of the said bonds, principal and interest, according to the tenor and effect thereof, the said Alton Water Works Company made, executed and delivered to Charles A. Caldwell, of the City of Alton, Illinois, as trustee, a certain trust deed, by which it conveyed in trust for the purpose of securing as aforesaid, all its property, real and personal, rights, privileges, choses in action and assets, which are more particularly therein decribed, which said trust deed is of record in the recorder's office of Madison County, Illinois, in book 148 of deed records, at page 461, et seq.

177 And whereas, of the said bonds so made and issued, as aforesaid bonds numbered 1 to 14 inclusive, and 73 to 150 both inclusive of $100 each, amounting to $9200 have been redeemed and paid up by this Company, and bonds numbered 151 to 300 both inclusive; 301 to 450 both inclusive of $100 each, bonds numbered 451 to 480 inclusive of $500 each, and bonds numbered 481 and 483 of $500 each, amounting in all to $46,000 still remain unpaid and outstanding and are owing by this Company;

And whereas, this Company is otherwise indebted in a large sum of money for the moneys with which said bonds have been redeemed, together with the interest thereon, and for moneys used in making extensions, repairs, improvements, and enlargements of its Water Works;

And whereas, it is deemed best and necessary for the interests of this Company that it should borrow the sum of $150,000 with which to take up and retire the $46,000 of bonds now outstanding, and pay off the said other indebtedness and for the use of said Company;

And whereas it is deemed best to make provisions at this time for procuring funds in the future with which hereafter to make such extensions, enlargements and renewals as this Board deems may become necessary during the term of the continuance of the mortgage hereinafter mentioned; and whereas, this Board determines that the sum of $50,000 will be needed for the purposes in the last previous clause in this preamble mentioned;

178 And whereas, it may be impossible at the present time to take up and redeem and pay off said $46,000 of said previous issue of bonds remaining outstanding as aforesaid;

Therefore resolved, that this Company make and execute its 200

bonds of $1000 each, payable Jan. 1st, A. D. 1907, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of July and January in each and every year after the execution of such bonds until due;

Resolved, that 46 of said bonds authorized by these resolutions, being bonds numbered respectively 105 to 150, both inclusive, be deposited with the Farmers' Loan and Trust Company, of the City of New York, as trustee, for the purpose of retiring the said $46,000 of the bonds of said former issue;

Resolved that fifty of said bonds by these resolutions authorized, being bonds numbered from number 151 to number 200, both inclusive, be deposited with the Farmers' Loan and Trust Company, as trustee, for the purpose of future sale for the making of such enlargements, extensions, improvements, renewals, and repairs as aforesaid;

Resolved, that to secure the payment of the said bonds or so many of them as shall at any time be outstanding and unpaid, together with interest thereon, at the time, in the manner, and at the place in said bonds specified, this Company the said Alton Water Works Company, make, execute, and deliver to the said Farmers' Loan and Trust Company, of the City of New York, as trustee, a mortgage upon all its property, real and personal, its rights, privileges, franchises, choses in action, and assets of every kind and description, now possessed or which at any time hereafter be acquired;

179 Resolved, that the President and Secretary are hereby directed and authorized to procure said bonds and mortgage to be drawn with such terms, conditions, stipulations, covenants and agreements as shall to them seem best, and as shall not in any particular contravene any express provision in these resolutions contained, and the said President and Secretary are hereby authorized to make, execute, and deliver the said bonds and the said mortgage, and the said bonds which are not deposited in trust with the said trustee under the previous terms of these resolutions, being bonds numbered from 1 to 104, both inclusive, shall be delivered by the said trustee to such person or persons as shall be designated in a written order to be signed by the President and Secretary of this Company, and upon the presentation to it of such written order the said trustee is authorized and directed and instructed to deliver to the person named in such written order the bonds therein mentioned, being any part of all the bonds executed under the authority of these resolutions, numbered from number one to number one hundred and four (1 to 104) both inclusive.

And whereas, in pursuance of the said resolutions, this company has made, executed, and delivered, its 200 negotiable bonds for the sum of $1000 each, of the form, tenor and effect following, that is to say:

No. —. $1000.

The Alton Water Works Company.

STATE OF ILLINOIS,
*City of Alton.*

180 On the first day of January, A. D. 1907, for value received the Alton Water Works Company promises to pay to the bearer one thousand dollars, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of July and January on presentation and surrender of the coupons hereto annexed, as they respectively become due; principal and interest payable in lawful money of the United States, at the office of the Farmer's Loan and Trust Company in the City of New York, New York.

The Alton Water Works Company reserves the right to pay this bond at any time after ten years from its date on giving sixty days' notice, and a notice published three times in a newspaper in the city of New York, N. Y. that this bond is called in shall be sufficient, and after the date at which this bond shall be by such notice, called in, interest shall cease. This bond is one of a series of two hundred of like tenor and date, amounting to the sum of $200,000 first consolidated mortgage bonds, issued by the Alton Water Works Company, and secured by a duly authorized, executed and recorded deed of trust, conveying the franchises, property, and income, including water rents due and to become due, of said corporation, made to the Farmer's Loan and Trust Company, of New York, N. Y. trustee.

In witness whereof, the Alton Water Works Company have caused this negotiable bond to be executed by its President who covenants that he is duly authorized in this behalf, and countersigned by its Secretary, and its corporate seal to be hereto affixed, this first day of January, A. D. 1887, in the City of Alton, Illinois.

—— ——,
*President.*

—— ——,
*Secretary.*

Attest:

—— ——.

181 To each of the said bonds forty coupons are attached of the form, tenor and effect following, that is to say:

$30. $30.

The Alton Water Works Company promises to pay to the bearer the sum of thirty dollars ($30) at the office of the Farmers' Loan and Trust Company, in the city of New York, N. Y. for six months' interest due on bond No. —.

—— ——, *President.*

Of which said 200 bonds, 46, being bonds numbered from 105 to 150, both inclusive, have been delivered to the said Farmers' Loan

and Trust Company, upon *the* subject to the following trust that is to say:

The said Farmers' Loan and Trust Company shall keep and retain the said 46 bonds to exchange for said $46,000 of said bonds of said former issue, which bonds are described as follows: One hundred and fifty bonds of one hundred dollars each numbered from 151 to 300 both inclusive, payable July 1st, 1887—one hundred and fifty bonds of one hundred dollars each numbered from 301 to 450 both inclusive, payable July 1st, 1892—thirty bonds of five hundred dollars each numbered from 451 to 480 both inclusive payable July 1st, 1897, and two bonds of five hundred dollars each numbered 481 & 483, payable July 1st, 1902—all of which bonds were issued July 1st 1877.

And at any time the said Farmers' Loan and Trust Company, upon the written request of the President and Secretary of the said Alton Water Works Company, shall, if it can obtain par in
182 cash for said 46 bonds, sell the same for not less than par in cash and keep and retain the proceeds thereof in trust for the purpose of the purchase and redemption of said bonds of said former issue last above described at par in cash. And of the said 200 bonds above described and secured by this mortgage, 50 of the same being bonds numbered from 151 to 200, both inclusive, have been deposited with the said Farmers' Loan and Trust Company in trust and upon and subject to the following trust, that is to say:

Whenever the said first party by its President and Secretary shall certify that it is necessary to make enlargements, extensions, or improvements, or provide new machinery for the works of this Company, and shall make to the said trustee a sworn statement of the estimated cost thereof, it shall then be the duty of said trustee to deliver to such party or parties as the first party may appoint and direct, so many of the said 50 bonds, so to be left in trust, as shall be sufficient at par to provide funds for the enlargements, extensions, improvements, or new machinery which shall have been certified to be necessary, and the said bonds so delivered shall thereafter be deemed to be outstanding, and the interest and principal thereof secured by this mortgage:

And whereas the said bonds and this mortgage have been, since the same were drawn and before the execution thereof, submitted at a regular meeting of said Board of Directors, held at the office of the Company in the City of Alton, on the 27th day of December, A. D. 1886, at which all of the Directors of the said company were present:

And whereas, after the submission of the said bonds and
183 mortgage in the form with the provisions therein contained, the said Board of Directors then and there unanimously passed the following resolution, that is to say:

Resolved, that this Board approves the bonds and mortgage submitted to it by the President and Secretary, and that the same correctly express the true intent and meaning of the resolutions heretofore, on the 27th day of December, A. D. 1886, passed by this Board, and which are set forth in this mortgage, and the said bonds and

mortgage are approved by this Board as being in pursuance of said resolutions:

Resolved, that the President and Secretary are hereby authorized and directed to execute the said bonds and mortgage in behalf of this Company, and that the same when so executed shall be the bonds and mortgage and the act and deed of this Company.

And whereas, then and there at said last mentioned meeting of said Board of Directors, the President and Secretary did execute in behalf of said Company said bonds and this instrument of mortgage as and for the bonds and mortgage of the said Alton Water Works Company.

Now This Indenture Witnesseth, that the Alton Water Works Company, party of the first part, in pursuance of and by the authority of law and of the proceedings of the Board of Directors aforesaid, to secure the payment of the principal and interest of the above described bonds, with pro rata equality, as hereinafter stated, and in consideration of the premises aforesaid, and of the sum of one
184 dollar to it in hand paid by the said Farmers' Loan and Trust Company, the said party of the second part, the said trustee, the receipt whereof is hereby confessed and acknowledged, and for the purpose of securing the payment of the holders of so many of said bonds as shall be negotiated, sold or exchanged, pursuant to the terms of the resolutions aforesaid, with pro rata equality, principal and interest, hath granted, bargained, sold, released, remised, enfeoffed, confirmed and conveyed and by these presents doth grant, bargain, sell, remise release, enfeoff, confirm and convey unto the said party of the second part, its successors and assigns, as trustee, for the uses and purposes and subject to the conditions and trusts hereinafter expressed, all its privileges, franchises, easements, choses in action, estates, property, real and personal, effects and assets which the said first party now has or may at any time hereafter during the existence of this mortgage acquire, whether the same be mentioned or not herein, among which are the following, that is to say:

All and singular the following described property situate lying and being in the city of Alton, County of Madison, and State of Illinois, known, described, and designated as follows, towit:

Beginning at a point in the bank of the Mississippi river, thence running parallel with the west line of Basse's mill lot, and distant therefrom twenty-five (25) feet to intersect the south line of the county road; thence westerly along the south line of said road one hundred and fifty (150) feet; thence south to the low water
185 mark line of the Mississippi river; thence along the low water mark line to the place of beginning. The interests of the party of the first part being hereby conveyed in and to said property being and intending to be all the interest which they acquired as purchasers and assignees of Henry Watson and Harry Taylor, by virtue of an ordinance and contract made between said Henry Watson and Harry Taylor and the city of Alton, dated November 8th, A. D. 1875, by which contract the said Watson and Taylor and their assigns were authorized to build, operate and maintain water works in the city of Alton, Illinois. The said piece of land is the land

upon which the pumping works are built and this deed of trust is intended to cover and convey not only all the buildings now erected on said land but also all others that may be erected, as well as the engines and all machinery of every kind and nature which is now or may hereafter be used in or about any buildings now on said land or which may be built upon the same.

In addition to the above land, buildings and machinery, the party of the first part also grants and conveys all the main pipes now laid on any and all of the various streets of the city of Alton, upon which the said pipes are now laid and also to include the pipes which will be hereafter laid upon any street in the city of Alton in extending the said main pipes upon the streets in which the pipes are now laid or extending the works by laying pipes upon streets in said city where at present there are none.

And this mortgage is intended to cover and include any
186 and all other pipes of any name, nature, or description which are now used in operating said water works, and which may be used or laid in extending said water works.

Also this mortgage is intended to cover and include the franchise which the party of the first part obtained upon its organization under the general law of the State of Illinois as aforesaid.

Also all the franchises and license and rights which it now has as assignee of said Henry Watson and Harry Taylor, under the contract and ordinance made between said Watson and Taylor and the city of Alton on the 18th day of November, A. D. 1875, as aforesaid, by which the said Watson and Taylor and their assigns were empowered to build, operate and maintain water works in the city of Alton.

Also the following described land in Alton, Illinois, viz: Beginning at a stone in the east line of State street where the south line of the north west quarter of section eleven (11), township five (5), range ten (10), west of the third principal meridian crosses State Street, thence east along said quarter section line four hundred and forty-nine (449) feet and eight tenths (8/10) of a foot to a stone, thence north to a point where a line running along and with the southwest end of lot thirteen (13) in block one (1) in Hawley's addition to Alton shall intersect the same, thence along said last mentioned line and lot thirteen (13) to the south east side of Vine Street, as designated on the plat of Hawley's addition, thence southwardly along said Vine Street to a point where a line crossing said Vine Street at right angles will strike the southeast corner of lot eighteen (18) in Semple's addition to Alton, thence along
187 the south line of said lot eighteen (18) one hundred and twenty-five (125) feet to a stone on the line of State Street, thence southwardly along the line of said State Street two hundred and seventy-eight (278) feet and six (6) inches to a stone set in the angle of State Street, thence southwardly along the line of State Street two hundred and ninety-seven (297) feet to the place of beginning, upon which land is built a reservoir used in operating the water works, excepting however from said last above described piece of land, a small piece of land in the southwest corner of the same fronting about sixty feet on State Street, which has been sold to

William Hope, who has erected on same a two story brick house. The party of the first part hereby conveying or intending so to do by this deed of trust not only all the property in any manner connected with its Water Works, but also all property which may be added in hereafter extending or operating the same.

And also the rents, debts, dues, demands, and choses in action of every kind and nature, including water rents from the said city of Alton, under and by virtue of said contract between the said city of Alton and said Watson and Taylor, or any other contract between the said city of Alton and the said first party, or which enures to the benefit of the said first party by assignment or otherwise, and all water works rents from private consumers.

And the said party of the first part hereby makes, constitutes and appoints the party of the second part, its successors and assigns, its true and lawful attorney in fact, in its name and in its place
188 and stead to have, receive, sue for demand and collect and receipt for all such debts, dues, demands, choses in action, and water rents herein conveyed, for the purposes of the trust in this mortgage expressed.

And this instrument shall work and be an absolute assignment of said dues, debts, demands, choses in action, and rentals both now existing or which may at any time hereafter be due, and the property of the said Alton Water Works Company, to the said second party as such trustee, to the extent and for the uses and purposes expressed hereinafter:

To Have and To Hold, the said rights, privileges, easements, choses in action estates, property real and personal, effects and assets above conveyed to the said second party, as trustee, and its successors and assigns, in trust nevertheless and subject to the following agreements and stipulations, covenants and trusts, that is to say:

First. This mortgage is given for the purpose of securing the payment 1st—Of the interest on said bonds in full; 2nd—The principal of such said 200 bonds hereinbefore described as shall be negotiated and sold, and as shall be outstanding at any time, according to the promises and agreements contained in said coupons and bonds, respectively, but pro rata and without any preference or priority between different bonds (it being understood that the lien of this mortgage is to secure the payment of all interest on any of said bonds in full, prior to the payment of any principal) the payments to be made said bondholders by said trustee or by any receiver or officer
189 acting as master in chancery or in case of foreclosure however, the moneys shall come to the said trustee, master, or receiver, shall be made pro rata, 1st—To pay said interest; 2nd—Said principal, without any preference or priority, and each of said bonds shall be deemed to be equally secured by this mortgage, and all supplementary conveyances or mortgages.

Second. So long as the first party shall observe, do, keep and perform, all and singular, the promises, agreements, covenants and stipulations, in said bonds and coupons and in this mortgage contained, and shall and will well and truly pay or cause to be paid the interest and principal of the debt evidenced and promised to be paid

by said bonds and coupons, at the time, in the manner and at the place therein mentioned for the payment thereof, it, the said first party, may retain possession of all mortgaged rights, franchises, privileges, easements, estate, choses in action, property real and personal, effects and assets without let or hindrance from the second party.

Third. In case the said first party shall pay the interest on said bonds as the same becomes due and payable, at the time, in the manner, and at the place the same is payable according to the terms of said bonds and coupons, and shall well and truly pay the principal of said bonds at the time, in the manner, and at the place for the payment thereof according to the terms of said bonds, and shall upon demand pay all the expenses of administering the trust, and shall, during the continuance of the lien of this mortgage, observe, do, keep and perform all the covenants, agreements and stipulations, herein contained, and all things by it to be observed, done, 190 kept and performed, according to said bonds and coupons, and this mortgage, then the said party of the second part shall cause this mortgage to be released and discharged (but at the expense of the first party), and all the mortgaged rights, privileges, franchises, easements, choses in action, property, estate, effects and assets, shall be released from the operation of the same.

Fourth. But should the said first party at any time make any default in the payment of the interest on said bonds or any installment or part of any installment thereof, at the time, in the manner, or at the place when and where said interest or any instalment or part thereof shall be due and payable, according to the terms of said bonds and coupons or should the said first party make any default, or neglect or refuse, or in any manner fail to observe, do, keep and perform, all and singular, each and every covenant, promise, agreement and stipulation, in said bonds and coupons and this mortgage contained, and by it to be observed, done, kept and performed, then the said second party may, at its option in case such default, neglect, refusal or failure shall extend for the period of ninety days, declare the whole sum, principal and accrued interest, evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default.

Fifth. In case of any default in the payment of the principal sum evidenced by said bonds according to the promises and agreements therein contained, or any default in the payment of interest according to the provisions and agreements of said bonds or coupons 191 and in case of any default, neglect, refusal or failure to observe, keep, and perform, all and singular, each and every covenant, agreement, promise, and stipulation in said bonds and coupons and this mortgage contained and by the first party to be observed, kept and performed, all the right of the first party to retain any possession of the mortgaged rights, privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets shall immediately cease and therefrom the right and possession of the same shall immediately vest in said second party, and the second party may at once enter into possession thereof, and the said first party and each any every occupant remove and put out, and may

have, receive, sue for, collect and receipt for in its own name or that of the first party, all and singular, the water rentals or prices due or to become due from the city of Alton or from others, or from private consumers and all and singular, the income of the first party, from what ever source derived, receive and have and all debts, dues, and demands of whatever nature or kind, receive, receipt for, and appropriate to the purposes of the trust created by this instrument, and may during such time as to it may seem fit and best, with or without foreclosing this mortgage continue in the possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, and operate the works of said first party and carry out and perform the contracts of the first party with its customers including the city of Alton, and make new contracts for the supplying of water, and by means of the works and machinery of the first party supply
192 water, and do, all and singular, the acts and things which the said first party could do in the premises if it had remained in possession of the same.

Sixth. And in case of any default as aforesaid, in the payment of interest or principal upon said bonds or coupons according to the terms and provisions thereof, which shall continue for ninety days, or in case of any default, neglect, refusal or failure to observe, do, keep, and perform, all and singular, the covenants, conditions, promises, agreements, and stipulations in said bonds and coupons or in this mortgage contained, it shall and may be lawful for the said second party to foreclose this mortgage and forever bar the first party of all equity of redemption therein, and in case of such foreclosure or any proceedings therefor, the said second party may, at the commencement of suit and before any plea, answer or demurrer is filed, apply for the appointment of a receiver of all the rents and profits, debts, dues, demands and choses in action, and the property, estate and assets of the first party hereby mortgaged or conveyed or intended so to be, of which it shall then possess or be entitled to or interested in, and such receiver shall be appointed without any opposition from the first party and such receiver shall be vested with all the rights and privileges, and subject to all the duties and obligations granted to and obligatory upon the second party in case of entry into possession, and as specified in the fifth subdivision of this mortgage, and in case of any foreclosure of this mortgage the whole sum of the indebtedness evidenced by said bonds and coupons,
193 both principal and interest, shall be deemed to be due and payable and such foreclosure shall be to satisfy such whole sum.

Seventh. In no event shall any expense of any kind fall upon said trustee, but all its expenses and costs, including the fees and charges of attorneys and agents employed by it in good faith, in the administration of the trusts herein contained, shall be paid by the first party.

Eighth. In case of any entry and taking possession by the said second party, or in case of any foreclosure proceedings, or in case of the appointment of any receiver or in case of the receipt of any

moneys by the second party or any receiver or officer of court, from any income, debts, dues, or demands, collected or received by it, him, or them, from any sale of the things or any of them herein mortgaged or conveyed or intended so to be, or hereafter conveyed by any assignment, conveyance, or supplementary mortgage, the costs and expenses of all kinds of the said trustees in the administration of the trust, of foreclosure and sale, of courts, officers, and receivers, shall be first paid out of said moneys, and the surplus, if any, shall be devoted to paying the whole of the indebtedness secured hereby, interest and principal, pursuant to the terms of the first above clause, until the whole thereof is paid, and if there should remain any surplus, the same shall be paid over to the first party.

Ninth. It is stipulated and agreed that said second party will safely keep the 46 bonds numbered from number 105 to 150, both inclusive, to be deposited with it according to the resolutions hereinbefore set forth, and the tenor of this mortgage, and will not
194 issue or deliver the same or suffer the same to become outstanding, except for the uses and purposes of exchanging, redeeming, and purchasing the said $46,000 of bonds of said former issue as hereinbefore set forth, and that the said second party will hold, use and dispose of the same for said purpose according to the tenor and provisions hereinbefore in this mortgage contained in reference to the trusts upon which said 46 bonds are so deposited with the said second party.

And the said second party hereby stipulate*d* and agrees that it will safely keep the 50 bonds numbered from number 151 to number 200, both inclusive, to be deposited with it according to the resolutions hereinbefore set forth and the tenor of this mortgage, and will not issue or deliver the same or suffer the same to become outstanding except for the uses and purposes of this mortgage, and will hold, use, and dispose of the same for said purposes according to the terms and provisions of this mortgage contained.

And it is stipulated and agreed that the certificate of the President and Secretary under the seal of the first party shall be sufficient evidence of the action of the first party in ordering the issue and delivery of said 50 bonds last mentioned or any of them, and of the necessity for the enlargements, extensions, improvements and new machinery, or either of the same, therein mentioned, and the sworn statement of the said President and Secretary shall be sufficient evidence of the estimated cost thereof.

Tenth. The party of the second part, as trustee or otherwise, shall be under no obligation to recognize any person or persons,
195 firm or corporation, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or owner, until such supposed holder or holders shall produce the said bonds and deposit the same with the trustee, and shall indemnify and save harmless the trustee, to its full satisfaction from any and all costs and expenses, outlays and counsel fees and other

reasonable disbursements, for which it may become liable or responsible or proceeding to carry out such request or demand.

Eleventh. The right of action under this Indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or any number of bondholders have any right to institute an action or other proceedings on or under this Indenture for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this Indenture shall be instituted and conducted by the trustee according to its sound discretion; but the trustee shall be under no obligation to institute any such suit or to take any proceedings under this Indenture until it shall be indemnified to its full satisfaction for all expenses and costs of every kind, and also for all possible claims for damages.

Twelfth. Should any suit or other proceeding be brought
196 against the trustee, by reason of any matter or thing connected with the trusts hereby created, or by reason of its being such trustee, it shall be under no obligation to enter any appearance by counsel, or in any way appear in and defend the said suit or proceeding, until indemnified to its satisfaction for so doing, but it may nevertheless appear and defend the same without indemnity if it shall elect so to do, and in such case it shall be compensated therefor from the trust fund.

Thirteenth. In case at any time it shall be necessary and proper for the trustee to make any investigation respecting any facts preparatory to taking any action, or doing or not doing any thing as such trustee, the certificate of the party of the first part, under its corporate seal, attested by the signature of its President and the affidavit of one or more directors, shall be sufficient evidence of such fact to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

Fourteenth. It shall be no part of the duty of the party of the second part to see to the recording of this Indenture as a mortgage or conveyance of real estate, or to the filing thereof as a chattel mortgage, or renewing such mortgage, or to do any other act which may be suitable and proper to be done for the continuing of the lien of this indenture, or for giving notice of the existence of such lien; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property or to renew any policies of insurance.

197 Fifteenth. The Trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney, or employé selected with reasonable discretion.

Sixteenth. The Trustee shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any duties that it may at any time perform in the discharge of the same; and all such fees, commissions, compensations and disburse-

ments shall constitute a lien on the mortgaged property and premises.

Seventeenth. It is further stipulated and agreed that in case the said trustees shall desire for any reason to surrender the trust conferred upon it by this instrument, it may at any time do so, and may nominate its successor, and if said person so nominated *as* a fit and proper person, the said first party shall by resolution of the Board of Directors, confirm the said nomination and certify the same to the said second party, and in such case the said second party may transfer the trust by deed properly executed to the successor so chosen, or the said second party may, in its discretion in the first instance, or in case the parties fail to agree, and with or without the consent of the first party, apply to any court then having equity jurisdiction in the county in which the mortgaged property or any part thereof shall be then situated, either a court of the United States or of the State of Illinois, for the appointment of such successor, and such court may appoint a successor to the second part; and
198 it is agreed and stipulated that the successor so appointed whether by act of the parties or by a court, upon accepting the same shall succeed to all the interest, rights and privileges and be subject to all the duties and obligations pertaining to the second party hereto, and to all intents and purposes the second party to this instrument, and any subsequent or supplementary assignment, conveyance or mortgage, the same as if originally named therein.

Eighteenth. And it is further stipulated and agreed that during the continuance of this mortgage the said first party will not commit or suffer to be committed any waste of its property or assets; that it will not release any contract it now has for the supplying of water to the City of Alton, or any person or persons, whereby the income of the first party shall in any way be diminished, either annually or in gross, without the consent of the second party. It is further stipulated and agreed, that at all times during the continuance of this mortgage, it will promptly, and before any penalty or forfeiture shall attach, in due season pay or cause to be paid, all taxes, levies, and assessments, laid upon it or its property or assets by any lawful authority, and in case of failure to do so, the said trustee may pay the same and add the same to the sum secured by this mortgage, and the same, with six per cent. interest, shall be preferred to the debt evidenced by said bonds and coupons, and any breach of this agreement for the payment of taxes for the space of three months, shall entitle the trustee to declare the whole
199 sum due, and to enter and take possession, or to foreclose this mortgage, or both; and it is further stipulated and agreed that during the continuance of this mortgage the said first party will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired.

Nineteenth. It is understood and agreed that all the conveyances, covenants, agreements and stipulations herein mentioned, apply to and bind as well the successors and assigns of the respective parties as the parties themselves.

Twentieth. It is hereby declared that the receipt or receipts of the trustee shall be sufficient discharge to the purchaser or purchasers at any sale or sales made by the said trustees under or in pursuance of any or either of any provisions for that purpose herein contained, for his or their purchase money, and that such purchaser or purchasers his or their heirs, executors or administrators, shall not after payment thereof, and having such receipt, be liable to see to its being applied for or upon the purposes and trusts of these presents, or in any manner howsoever be answerable for any loss, misapplication or non-application of such purchase moneys, or any part thereof, or be obliged to inquire into the necessity, expediency or authority of or for any such sale.

Twenty-first. No delay or omission of the said trustee or of the holders of the bonds secured hereby, in respect of any default happening or continuing as aforesaid to exercise the rights and
200 powers arising therefrom, as hereinbefore provided, shall be held to exhaust or impair such rights and powers, or be construed to be a waiver of such defaults, but it is hereby mutually agreed as conditions subject whereto the bonds secured hereby are issued and held by each successive holder, that the holders of a majority in interest at any time outstanding, may by an instrument under their hands and seals or resolution adopted at a meeting of such bondholders, waive, or instruct the trustee to waive, any default occurring and the rights accruing therefrom, on such terms and conditions, or without any conditions, as to such majority shall seem proper, provided always that no such action of the bondholders shall extend to or be taken to effect any subsequent default or impair the rights resulting therefrom, unless expressly provided for. Any such majority of bondholders may in like manner, if upon default, as hereinbefore provided, the principal of all or any of the bonds hereby secured shall have become, or be by said trustee declared due and payable before the period therein mentioned for the payment thereof shall have expired, waive such default or reverse the action of said trustee in that behalf, and on default in the payment at maturity of the principal of any of the bonds secured hereby, such majority may in like manner waive such default and any rights arising therefrom, respecting any bonds secured hereby not then matured and extend the time for the payment of the principal of such as shall have matured or any part thereof, for such period or periods not exceeding five years, with provisions for interest in the meantime, as
201 shall to such majority seem proper, provided the rate of interest shall not be reduced unless the reduction be uniform on all the bonds at the time outstanding and ratably on the rate therein provided respectively, and if, upon any default as aforesaid, the said trustee shall, either on his own motion, or after requisition and indemnification, proceed to execute the power of entry or that of sale or both, or take legal proceedings for the enforcement of the rights of bondholders accruing from such defaults, it shall be competent for such majority in interest, in manner aforesaid, to instruct the said trustee to suspend or postpone the execution of such powers, or the prosecution of such legal proceedings for a period definite or in-

definite, but not longer than five years, with such uniform provisions with regard to interest accruing or principal maturing in the meantime and arrears of interest on bonds matured as to such majority may seem expedient, which instruments, if so given, shall be controlling and shall be conformed to, and any such action by the majority as in this article provided, shall be binding and conclusive upon all the bondholders, the intent of this provision being to afford time for the resuscitation of the company's finances in case of disaster thereto or disappointment of the present expectations, if a majority in interest of such bondholders shall deem it expedient.

Twenty-second. On any sale, whether by the said trustee or the court, of the property hereby conveyed or any part thereof, the trustee shall have the right to buy in the same, and a ma-
202 jority in amount of the bondholders of the outstanding bonds shall have the right, by a written instrument, under the hands and seals of such majority, to fix a sum which it shall be the duty of the trustee to bid for the property to be sold, on behalf and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of said trustee or a court, as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of these presents and of the proportion of such sum payable to the bondholders not concurring in such request. On any purchase the trustee shall hold the property so purchased upon trust for the equal benefit of the bondholders who had required the trustee to buy in the property in their behalf as the absolute property of said bondholders, without any right of redemption or re-sale in favor of said Company or any bondholder.

Twenty-third. The Trustee shall have power to release from the lien of this mortgage any land, machinery, or other property, which has become useless for the purposes of the Company from any cause but only on condition that such property be forthwith replaced by other property of equal value and subject to the lien of these presents.

Twenty-fourth. And whereas, by reason of distance, lapse of time, or other accident, the dates of the actual execution of this indenture of mortgage and trust by the various parties thereto, may be previous or subsequent to the day on which it bears date, now it is
203 hereby expressly agreed and declared that this indenture of mortgage and trust shall be dated the first day of January, A. D. 1887 and shall be valid and effectual as if executed on the day of the date thereof; and this indenture of mortgage and trust is the indenture of mortgage referred to in the bonds hereinbefore mentioned, the form whereof is hereinbefore set forth and is made and executed by and between the parties hereto as and for the indenture of mortgage and trust securing and intended to secure said bonds, as in said bonds is mentioned and recited.

And in further consideration of the premises, the said first party, for itself, its successors and assigns, doth covenant, grant, bargain and agree to and with the said second party, its successors and assigns, that it is well seized of all the mortgaged property and assets; that there is no incumbrance on any of its property, rights, choses in action, or assets hereby conveyed or intended so to be, and that all

said rights, privileges, easements, estate, property real and personal, effects and assets hereby conveyed and mortgaged, or intended so to be, against all lawful claims it will forever warrant and defend.

And in further consideration of the premises, the said first party, for the further assurance of the second party and the holders of said bonds, doth covenant, grant, bargain and agree to and with the said second party that it will at any time in the future, upon demand, at its own expense, execute, deliver and record (if proper for record) all such further and other conveyances, assignments, and sup-
204 plementary mortgages of the rights, privileges, easements, estate, choses in action, property real and personal, effects and assets, now owned by it, whether conveyed by this conveyance or not, and of any right, privilege, easement, estate, chose in action, property real and personal, effects and assets, which it may at any time thereafter acquire, as the said second party may demand, to subject the same to the lien of this mortgage and such further and other conveyances, assignments and supplementary mortgages shall be deemed a part of this instrument and form together one security for the payment of the debt evidenced by said bonds and coupons.

And in further consideration of the premises, the said first party doth covenant, bargain and agree to and with the second party that during the continuance of this mortgage it will not suffer or permit any lien of mechanics or material men or others of any kind, or any incumbrance of any kind, upon any of the property hereafter to be acquired or assets, which shall be *a* prior to the lien of this mortgage or before the execution of that instrument subjecting the same to the lien of this mortgage.

The recitals herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of any statement therein contained.

In Witness Whereof the said Alton Water Works Company hath caused these presents to be executed by its President and Sec-
205 retary, and sealed with its corporate seal at Alton, Illinois, this 27th day of December, A. D. 1886.

ALTON WATER WORKS COMPANY.
By T. A. TAYLOR, *President.*
W. A. UNDERWOOD, *Secretary.*

In presence of:

H. S. BAKER, JR.
EDGAR HALLISTER.

[CORPORATE SEAL.]

The Farmers' Loan and Trust Company hereby accepts the foregoing trust.

New York, Jan'y 6th, 1887.

R. G. ROLSTON,
*President.*

[CORPORATE SEAL.]

Attest:

WM. H. LEUPP, *Secretary.*

STATE OF ILLINOIS,
*County of Madison, ss:*

On this 27 day of December A. D. 1886, personally appeared before me Truman A. Taylor, the President, and William A. Underwood, the Secretary of the Alton Water Works Company, known to me to be the same persons who, as such President and Secretary of said Alton Water Works Company, executed the foregoing instrument, and each acknowledged the foregoing instrument to be the free
206 act and deed of the said Alton Water Works Company, executed by it for the uses and purposes therein mentioned.

[NOTARIAL SEAL.] H. S. BAKER, JR.,
*Notary Public.*

STATE OF NEW YORK,
*City and County of New York, ss:*

On this 6th day of January, 1887, before me personally came Rosewell G. Rolston, the President of the Farmers' Loan and Trust Company, of the City of New York, with whom I am personally acquainted, who being by me duly sworn said that he resided in the City of New York; that he is the President of the Farmers' Loan and Trust Company of the City of New York; that he knew the corporate seal of said Trust Company; that the seal affixed to the within instrument was such corporate seal; that it was affixed by order of the Board of Directors of said Trust Company and that he signed his name thereto as President, by the like authority.

[NOTARIAL SEAL.] C. A. SEARLS, "181
*Notary Public, N. Y. County.*

(County Clerk's Cert. attached.)

6. Among the properties conveyed by said trust deed to your orator was the leasehold, of which thirteen years then remained, of the lot of land upon which was erected the pumping works operating said water works, which leasehold extended to the year 1900; and
207 also the fee of lot of land on State and Vine streets in the city of Alton upon which were and are situated the reservoir and standpipes connected with said water works plant.

7. Under and in accordance with the provisions of said deed of trust your orator certified in the form set forth in said deed of trust one hundred and sixty-nine (169) of the bonds to secure which said deed of trust was given, aggregating the sum of one hundred and sixty-nine thousand dollars ($169,000) of principal, all of which said bonds had been theretofore executed by said Alton Water Works Company; and your orator is informed and believes that said bonds, numbered from one to one hundred and four (1 to 104), both inclusive, and one hundred and fifty-one to two hundred (161 to 200), both inclusive, were duly issued and negotiated by said Alton Water Works Company and are outstanding and existing obligations on the part of said Alton Water Works Company in the hands of bona fide purchasers for value. Fifteen (15) of said bonds being numbered from one hundred and five to one hundred and nineteen (105

to 119), both inclusive, aggregating fifteen thousand dollars ($15,000), were in accordance with the provisions of said deed of trust duly issued in exchange for an equal amount of the forty-six thousand dollars ($46,000) of prior bonds secured by said trust deed to Caldwell and said fifteen thousand dollars ($15,000) of said prior bonds are now held by your orator under and in pursuance of the trust created by said deed of trust.

8. Default has been made by said Alton Water Works Company and its successors and assigns in the payment of the install-
208 ment of interest which fell due on said one hundred and sixty-nine bonds on the first day of July, A. D. 1900, at the time, in the manner and at the place when and where said interest became due and payable, although demand was made for some of said interest by and on behalf of the interest coupons so defaulted on and after the maturity thereof and such default has continued for the period of more than ninety days since said demand, and still continues, and all of said defaulted interest coupons are now over-due and unpaid. Your orator has therefore declared and does hereby declare the whole sum of principal and interest evidenced by said bonds and coupons to be immediately due and payable and in default. The holders and owners of a very large majority of said bonds have requested your orator, in writing, to commence this suit and to foreclose the said mortgage or deed of trust.

9. Since the making of said trust deed to your orator the said mortgaged property has been extended and enlarged and particularly there have been laid water mains and water pipes in connection with said original water works extending east from the city of Alton into East Alton or Upper Alton and several miles of water mains have been there laid which are supplied with water only through and from the water mains of said water works which were in operation at the time of the making of said trust deed to your orator. And your orator shows that said additional water mains were purchased and laid with money derived from the sale of bonds secured by said trust deed to your orator and the earnings of said original
209 water-works plant as your orator is informed and believes. There has also been built and installed a new pumping station on the bank of the Mississippi river about a mile above the pumping works in operation at the time said trust deed to your orator was made. Much of the machinery, especially the large pump which was in use in said old pumping station and which is under the lien of said trust deed to your orator, has been by said Boston Water and Light Company, or the New England Water Works Company, moved from said old pumping works to said new pumping works and now forms a large and effective part of said new pumping works and without it, said pumping works could not supply the water needed, and the pump so taken from said old pumping works is the pump that is now forcing water through all of said water works plant. Such removal was made fraudulently and for the purpose of attempting to remove said machinery from the lien of the trust deed to your orator, and it is still in the hands of the parties so

removing it. And your orator states further, on information and belief, that the money used to acquire the property on which said new pumping works are situated and to build said new pumping works came from the earnings of the water-works property so mortgaged to your orator.

9*a*. Your orator therefore insists that said trust deed to your orator constitutes a first lien superior to the right of all the parties defendant hereto upon all of the water mains and pipes situated in Madison County and connected with or drawing water from said water-works plant in existence at the time of the making of
210 said trust deed to your orator and also a like lien upon said new pumping works and the ground upon which it is situated and all the machinery, power and pumping plant thereon and upon all mains connecting said pumping works with the water works system in said city of Alton; and that all of the property mentioned in this paragraph is so under the lien of said trust deed to your orator as after-acquired property, except that part of the new pumping works which was so taken from the old pumping works and which was, therefore, originally under said trust deed to your orator; that all the water mains mentioned and referred to are permanently connected and form one continuous water pipe service extending from the power plant and the reservoir and the standpipes of said water works, and that all the machinery, engines, boilers and pumps in said power houses are firmly and permanently annexed to the realty and have become fixtures, and therefore, form part and parcel of said water works plant and as such are all subject to the lien of said trust deed to your orator.

10. Your orator claims that, among the after-acquired property so coming under the lien of said trust deed to your orator, is the land upon which said new pumping works are situated, being described as follows:

"A certain tract of land in the northwest part of the south fractional half of Sec. 10 in Township 5, North, in Range 10, West of the Third Principal Meridian, in Madison county, being part of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong by deed dated July 15, 1891, and recorded in
211 Book 211 of Records at page 91 and further described as beginning at the point of intersection of a line at low water mark of the Mississippi river which point of intersection is 40 feet northwesterly from the easterly and southeasterly line of the land conveyed by Mary J. Armstrong and husband to Katherine Armstrong as aforesaid. Thence in a northeasterly direction 200 feet more or less to intersect the center line of the county road in said south fractional half of said Section 10 so as to form at said intersection a right angle with said center line of said county road; thence north 57 deg. west along said center line 300 feet to a point; thence southwesterly and at right angles to said center line of said road 200 feet more or less to the Mississippi river; thence southeasterly down the Mississippi river 300 feet to place of beginning, together with the right to lay water mains across other lands belonging to Katherine Armstrong from the property described to the reservoir and

standpipes; together with all buildings, improvements, water mains and machinery upon said land."

11. Your orator is informed that certain of the defendants herein claim that, after the execution, delivery and recording of said trust deed to your orator, and on or about the twenty-fourth day of April, A. D. 1893, the said Alton Water Works Company made, executed and delivered to said New England Water Works Company a deed whereby it purported to convey to said New England Water Works Company all its property, and said New England Water Works Company claims to be the owner of said property. And it is fur-
212 ther in like manner claimed that thereafter, about August, A. D. 1894, said New England Water Works Company executed and delivered a deed of trust to the defendant, the American Loan and Trust Company as trustee, covering the property so mortgaged to your orator, to secure certain bonds of said New England Water Works Company; and did also thereafter, about May, A. D. 1895, execute and deliver to said American Loan and Trust Company as trustee a certain other deed of trust covering its property; and did also, in June, A. D. 1900, execute and deliver to Anson M. Lyman, trustee, a chattel mortgage purporting to convey certain of the property hereinbefore described to secure five promissory notes of ten thousand dollars ($10,000) each. But your orator expressly shows and insists that all the interests of said New England Water Works Company and the American Loan and Trust Company, trustee, and said Lyman, trustee, under all of said conveyances are subject and subordinate to the rights of your orator in the premises and to the lien upon all of the property in this bill described of said trust deed to your orator.

13. The said Boston Water and Light Company claims to own or have some interest in some of the property hereinbefore described and particularly in the new pumping works above described and your orator is informed and believes that said Boston Water and Light Company did, in October, A. D. 1897, execute and deliver to said International Trust Company a trust deed conveying all of its property in said Madison county to secure a possible issue of two hundred thousand dollars of bonds, which document was re-
213 corded in the recorder's office of Madison county, in book 253 of records, at page 82. And said Boston Water and Light Company did also execute and deliver a supplement to said last mentioned trust deed or mortgage, dated November 1, A. D. 1897, and recorded in the recorder's office of Madison county, in book 257, at page 1; and your orator shows and insists that all the rights and interests of said Boston Water and Light Company and of said International Trust Company in and to all the property described in the bill of complaint are subordinate to the lien of said deed of trust made by said Alton Water Works Company to your orator.

14. Said New England Water Works Company and said Boston Water and Light Company claim that, subsequent to the execution of said deed of trust to your orator and about October 1, A. D. 1897, they entered into a contract with each other, wherein and whereby the said Boston Water and Light Company agreed to supply all the

said system of water works with water and to do the pumping necessary for that purpose, and said New England Water Works Company agreed with said Boston Water and Light Company to guarantee the payment of dividends on certain stock of the said Boston Water and Light Company and the interest on certain bonds; and your orator is informed and believes said New England Water Works Company acting under said contract has used and appropriated a very large part of the income of said water-works system, assigned to your orator by said deed of trust and which belonged and were applicable
214 to your orator's said trust, in paying interest on said Boston Water and Light Company's bonds and dividends on its stock, and in pursuance of said contract said New England Water Works Company and said Boston Water and Light Company have also dismantled the pumping works station covered by the deed of trust to your orator, and transported machinery therefrom to lands claimed by said Boston Water and Light Company as its property; which removal was fraudulent and done for the purpose of attempting to withdraw said machinery from the lien of said trust deed for the gain and benefit of the companies so removing the same; and have used the income of the property so mortgaged to your orator to pay for said lands and for the erection of said new pumping works thereon. And your orator charges that said machinery, so moved, is still subject to the lien of the trust deed to your orator and that said contract between said New England Water Works Company and said Boston Water and Light Company for the operation of said water works and all the provisions thereof and all the rights of said Boston Water and Light Company and said International Trust Company in and to the property and contracts mentioned in this paragraph are all subordinate to the lien of said trust deed to your orator.

15. The United Water Works Company, Limited, is a corporation organized and existing under the laws of the State of New York and insists that, in June, A. D. 1900, it obtained a judgment for twenty-five thousand dollars and sixty-five cents and costs against the
215 New England Water Works Company and that said judgment now constitutes a lien upon the property conveyed by said trust deed to your orator. But your orator calls for strict proof of any such judgment and denies that said United Water Works Company thereby acquired any lien on said property. And your orator insists that all right and interest in said United Water Works Company, Limited, if any it has, in and to any of the property mentioned in this bill or conveyed by said trust deed to your orator are subordinate to the lien of said trust deed to your orator.

15*a*. C. H. Venner, of Boston, Massachusetts, has been at various times largely interested in water-works companies and is now president of several water-works companies. He owned or controlled the controlling interest in the capital stock of said New England Water-Works Company at the time said trust deed to your orator was made, and has been in such control ever since. W. H. N. Francis is a clerk in the employ of said Venner and acts frequently as secretary or treasurer of companies so controlled by Venner. Truman A. Taylor, Receiver in this cause, was put by Venner in control of said Alton

Water-Works when Venner so acquired control and has remained in such control under said Venner, during most of the time since, and has been substantially in the employ of Venner for over ten years. The said deed of trust to your orator was signed by T. A. Taylor, president. The quit claim deed from the Alton Water-Works Company to the New England Water-Works Company was signed by Venner, as president and T. A. Taylor, as secretary. Two
216 other documents between the same parties of about the same date are signed in the same way. The chattel mortgage from the New England Water-Works Company to Lyman is signed by Venner, as president and Francis, as secretary of the grantor. The deed of trust from the Boston Water and Light Company to the International Trust Company is signed by Venner, as president and Francis, as Treasurer of said Boston Company. Said Alton Water-works Company, the New England Water-works Company and the Boston Water and Light Company are therefore completely under the control and direction of said Venner. Your orator states on information and belief that said United Water-works Company is also under the control of said Venner, its officers being employees of his.

15*b*. Having thus control of said New England Water-works Company and said Boston Water and Light Company, said Venner on or about October 1, 1897, caused two contracts between the said companies to be prepared and executed. In and by the first of said contracts it was provided that the Boston Water and Light Company should erect said new pumping works and raise the money to so erect them by issuing bonds to the full amount of the cost of said pumping works. And that it would thereupon from said pumping works furnish water to the water-works plan of said New England Company. And by said contract New England Company agreed to pay promptly all the cost of operating said pumping works and also to guarantee the prompt payment of all interest falling due upon said bonds, and also to pay a bonus of Five Thousand Dollars per year to said
217 Boston Company in the form of a five per cent dividend upon the One Hundred Thousand Dollars of capital stock of said Boston Company. By the second of said two contracts, it was provided that said Boston Company should lay mains throughout the City of Alton and that it should remain the owner of said mains, and that the New England Company would pay it a yearly rental of ten per cent of the actual cost of said mains. And should also make all repairs and keep the same in good condition. By both of said contracts it was provided that the title of said pumping works and additional water mains should remain in the Boston Company. Both of said contracts are for a term of twenty years. Said new pumping works were erected within the city limits of Alton, and it is claimed that some new water mains were laid under the provisions of said contract. At the time said new pumping works were erected and said additional water mains laid, said New England Company had an exclusive contract and franchise, with the City of Alton for the erection of waterworks and the laying of mains within the limits of said city. The Boston Water and Light Company has never had any

ordinance or franchise from the City of Alton to erect water works or lay mains within said city of Alton.

15*c*. Your orator attaches hereto as exhibits B. and C. copies of said two contracts of October 1, 1897, between said Boston Water and Light Company and said New England Water Works Company, and insists that inasmuch as both corporations parties thereto were
218 under the control of the same man and were acting by the same officers, said contracts can only be enforced so far as they are equitable. At the time of the making of said two contracts the Boston Water and Light Company had not qualified to do business in Illinois, under the statutes thereof, and could not legally execute said contracts in the manner in which the same were executed. or do any business in this state, and said contracts are therefore void.

15*d*. Having such control of said two contracting companies, said Venner caused the large Allis pump, which has a capacity of two and one-half millions of gallons per day, to be taken from the pumping works of said New England Company and placed in said new pumping works. Such removal was done without any compensation therefore to the New England Company, as your orator is informed and believes, and without the knowledge or consent of your orator.

15*e*. Your orator charges that the effect of said transactions between said Boston Water and Light Company and said New England Water Works Company was that the said new pumping works, and the additional mains laid, were so erected and laid by said New England Water Works Company as renewals and extensions of the Water Works plant so mortgaged to your orator, and that in said transactions the Boston Water and Light Company acted simply as a contractor for, or the contracting agent of said New England Water Works Company. And said new pumping works and said additional mains became at once the property of said New England Com-
219 pany and part of said mortgaged property, and all of it became subject to the lien of said deed of trust to your orator. Thereby also the said large Allis pump, which formerly belonged to said Alton Water-works Company and was under the lien of said trust deed to your orator, became and was commingled with and now forms a large part of said new pumping works, and thereby also the lien of said trust deed to your orator extends over said new pumping works.

15*f*. Your orator charges on information and belief, that a large amount of moneys pledged to your orator was used and expended in erecting said new pumping works, and said New England Water Works Company has also paid to said Boston Water and Light Company large amounts of moneys in the form of so-called rental and dividends upon the capital stock of said Boston Company, which should be applied upon the cost of erecting said new pumping works. And your orator is therefore entitled to an accounting with said Boston Water and Light Company as to the amount so paid it.

16. Thirty thousand dollars ($30,000) of the thirty-one thousand dollars ($31,000) of bonds outstanding under the provisions of said trust deed to Caldwell are now over-due and your orator insists that it is entitled to have the amount due upon said thirty-one (31) bonds

ascertained and to have provision made to have the same paid under any foreclosure sale in this cause.

17. Your orator is informed and believes that said Alton Water Works Company and said New England Water Works Company are each of them insolvent and wholly unable to pay their re-
220 spective debts and obligations; and that all the property and premises so covered by said deed of trust to your orator are and constitute very inadequate security for the payment of the amounts due on the bonds issued and outstanding under the trust deed to said Caldwell and the trust deed to your orator; that the mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the beneficiaries under your orator's trust deed, viz: the holders of the bonds secured by said deed of trust to your orator.

18. By reason of the matters and things hereinbefore alleged there is due to your orator, as trustee under the aforesaid deed of trust, the amount of the principal sums secured by all of the said bonds that have been issued and are now outstanding, together with the coupon interest which fell due thereon on July 1, A. D. 1900, with interest on said principal and on said coupons from the first day of July, A. D. 1900.

19. In consequence of the embarrassed condition of the financial affairs of said Alton Water Works Company and said New England Water Works Company your orator is advised and charges that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator and all the said subsequently acquired property and all the property mentioned in this bill and all the rights, franchises and property of the said Alton Water Works Company and said New England Water Works Company of whatever name, nature or description, including all its money
221 on hand and the earnings of the same be placed in the hands and under the control of a receiver to be appointed by this court, with such proper powers and control over the same as to the court shall seem right and equitable.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and can only have relief in a court of equity where matters of this nature are properly cognizable; and,

To the end that the said defendants and each of them may true, full, direct and perfect answer make to all and singular the premises (but not under oath, their answer under oath being hereby waived) and that as fully and particularly as if the same were here repeated and they and each of them were specially interrogated thereto; that a receiver may be appointed in this case of all and singular the rights, franchises, properties and assets of every name and nature of said Alton Water Works Company and said New England Water Works Company and of all the property mentioned in this bill of complaint, with power and authority to said receiver to operate said water works and carry on the business thereof with all the usual powers and duties of receivers in such cases and with authority to proceed, by suit or otherwise, to collect all moneys justly due to said New England

Water Works Company or said Alton Water Works Company; that an injunction may issue out of this court, restraining and enjoining all parties hereto and all their agents and servants from in any way interfering with the possession or control of said property
222 by said receiver and from selling, transferring, conveying, leasing, or otherwise disposing of or concealing any of the said property, rights or franchises; that an account may be taken of the amount due upon all bonds outstanding under said trust deed to said Caldwell, and that the lien of said amount upon all of the property mentioned in this bill may be determined; that an account may be taken of the amount due upon all bonds issued under the provisions of said trust deed to your orator and that the lien of said trust deed upon all the property mentioned in this bill may be determined; that the amount so found due upon the bonds issued under the provisions of said deeds of trust to said Caldwell and your orator may be found to be a lien upon said property according to the true terms thereof and prior to all rights, interests and liens of all the other parties hereto; that any property taken from the property covered by the trust deed to your orator may be restored; that the equitable ownership of said new pumping works and additional water mains may be ascertained and decreed and the amounts due thereon and paid thereon may be ascertained and provided for; that the said Alton Water Works Company and said New England Water Works Company may be decreed to pay the amount so found due upon said bonds and the coupons and interest thereon; that in default thereof, all the property and franchises of the Alton Water Works Company and of the said New England Water Works Company covered by said trust deeds to said Caldwell and to your orator may be sold under the decree of this court to satisfy the amount so found due; that, out of the proceeds of such sale or the net
223 earnings while in the hands of said receiver so to be appointed there may be paid, first, the costs and expenses of your orator in this suit, including proper compensation to your orator and its solicitor, and that the residue thereof may be applied to the payment of the amount due upon the said mortgage bonds and coupons with interest thereon; that, if there be any surplus it may be applied in such a way as the court may direct; that, upon any such foreclosure had herein all the defendants in this suit and all persons claiming by, through or under them since the beginning of this suit may be barred of and from any equity of redemption of, in and to the said property and franchises; that any deficiency on said sale may be entered in this cause as a judgment against said Alton Water Works Company and that your orator may have such other, further and different relief in the premises as the circumstances of the case may require and to your honors may seem meet:

May it please your honors to grant unto your orator a writ of summons to be issued out of and under the seal of this honorable court, commanding the said defendants The New England Water Work Company, a corporation, etc.; The Alton Water Works Company, trustee, a corporation, etc.; The American Loan and Trust Company, trustee, a corporation, etc.; The United Water Works Company, a

corporation, etc.; The Boston Water and Light Company, a corporation, etc.; The International Trust Company, trustee, a corporation, etc.; Charles A. Caldwell, trustee; Anson M. Lyman, trustee, and the unknown owners and holders of ten promissory notes of
224 five thousand dollars each, dated June 5, 1900, signed by the New England Water Works Company, payable to the order of Anson M. Lyman, and secured by a chattel mortgage from the New England Water Works Company to Anson M. Lyman, trustee, dated June 5, A. D. 1900, and recorded in book One of chattel mortgages, at page 136, in the recorder's office of Madison County, Illinois, personally to be and appear before this honorable court at a certain time and under a certain penalty therein to be limited, then and there to answer fully the premises, and further to stand to, perform and abide such further order and decree herein as to your honors may seem meet.

And your orator will ever pray, etc.

THE FARMERS LOAN & TRUST COMPANY,
*Trustee, Complainant,*

By RUNNELLS & BURRY AND
TRAVOUS, WARNOCK & BURROUGHS,
*Its Solicitors.*

WM. BURRY,
*Of Counsel.*

225 STATE OF ILLINOIS,
*County of Madison, ss:*

William Burry, being duly sworn on oath says that he is one of the solicitors for said complainant, the Farmer's Loan and Trust Company; that he is acquainted with the subject matter of this suit; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein set forth are true as therein stated.

WM. BURRY.

Subscribed and sworn to before me this 16th day of November, A. D. 1900.

THOS. W. SPRINGER,
*Circuit Clerk.*

226 DEFENDANTS' EXHIBIT "B."

*Copy of Petition for Removal and Bond.*

STATE OF ILLINOIS,
*County of Madison, ss:*

In the Circuit Court of Madison County.

In Chancery.

*Bill for Receiver, &c.*

UNITED WATER WORKS COMPANY, LIMITED, Complainant,
vs.
NEW ENGLAND WATER WORKS COMPANY, ALTON WATER WORKS Company, Farmer's Loan & Trust Company, The American Loan & Trust Company, Anson M. Lyman, Charles A. Caldwell, Trustee, Defendants,

and

In Chancery.

*Bill to Foreclose Mortgage, &c.*

THE FARMER'S LOAN & TRUST COMPANY, Complainant,
vs.
THE NEW ENGLAND WATER WORKS COMPANY, THE ALTON WATER Works Co., The American Loan & Trust Co., Anson M. Lyman, Trustee; Chas. A. Caldwell, Trustee; The Boston Water & Light Co., The International Trust Co., and the Unknown Owners and Holders of Ten Promissory Notes of $5000.00 Each, Dated June 5th, 1900, Signed by The New England Water Works Co., Payable to the Order of Anson M. Lyman and Secured by a Chattel Mortgage from The New England Water Works Co. to Anson M. Lyman, Trustee, Dated June 5, A. D. 1900, and recorded in Book "C" One of Chattel Mortgages, at Page 136, in the Recorder's Office of Madison County, Illinois, Defendants.

Consolidated Causes.

227 *Petition for the Removal of These Consolidated Causes to the United States Circuit Court for the Southern District of Illinois.*

To the Honorable the Circuit Court of Madison County in the State of Illinois:

Your petitioner, the Boston Water and Light Company, respectfully shows that it is one of the defendants in the latter of the above entitled suits and that the matter in dispute in each of said suits ex-

ceeds exclusive of interest and costs, the sum or value of two thousand dollars.

Your petitioner further shows that each of said suits is of a civil nature in equity; that your petitioner is not a party to the first of the above entitled suits or in any manner interested in the property or matters in controversy therein; that there is in the latter of the above entitled suits a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your petitioner, who avers that it was at the time of the bringing of the latter of said suits and still is a citizen of the State of Maine in which it was then and still is incorporated, and the said complainant, the Farmer's Loan and Trust Company, who as your petitioner avers was then and still is a citizen of the state of New York in which state it was then and still is incorporated and that at the time of the bringing of either of said suits your petitioner was not and is not now a resident of the State of Illinois; that the said controversy is of the following nature to-wit: an effort on the part of said complainant by its bill of complaint in
228 the latter of said suits to subject to the lien of the deed of trust sought to be foreclosed by said bill of complaint, certain real estate described in said bill but not in said deed of trust together with the pumping house, filters and other improvements thereon, and certain lines of Water mains and fixtures connected therewith, laid in the City of Alton and in the Village of Upper Alton, in which said real estate, pumping house, filters, improvements and lines of water mains and fixtures connected therewith, neither the Alton Water Works Company, the maker of said deed of trust, nor its successors nor assigns ever had any title, interest or ownership or possession or right of possession thereof, but which on the contrary were purchased, built and laid by your petitioner with your petitioner's own funds for its own uses and purposes as owner thereof and which, ever since so purchasing the same, have been and long before and at the times said suits were respectively commenced were in the open, adverse and exclusive possession of your petitioner as sole owner thereof and so remained in your petitioner's possession until the receiver appointed in said suits deprived your petitioner of such possession, of which said real estate and pumping house, filters and improvements your petitioner is the owner in fee and the legal and equitable title to which real estate was long before and at the times said suits were begun and ever since has been and still is in your petitioner and in no other corporation or person, all as set forth in your petitioner's answer to said bill of complaint; and that your petitioner and the said complainant are both actually interested in said controversy and that the matter in dispute in said controversy
229 exceeds, exclusive of interest and costs the sum or value of two thousand dollars.

Your petitioner further shows that at the times said suits were respectively brought the citizenship of the parties to said suits other than said complainant and your petitioner was and still is as follows: the said United Water Works Company, Limited, was and is a citizen of the state of New York, the Alton Water Works Company was

and is a citizen of the state of Illinois; Charles A. Caldwell, trustee was and is a citizen of the state of Illinois; the New England Water Works Company was and is a citizen of the state of Rhode Island; the American Loan and Trust Company was and is a citizen of the state of Massachusetts and the International Trust Company was and is a citizen of the state of Massachusetts.

And your petitioner offers herewith a bond with good and sufficient security in the penal sum of five hundred dollars conditioned for your petitioner's entering in the Circuit Court of the United States for the Southern District of Illinois on the first day of its session a copy of the record in the latter of the above entitled suits and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit is wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further in said latter suit except to make an order of removal thereof as required by law and to accept the said surety and bond and to cause the record in said latter suit to be removed to said
230 Circuit Court of the United States within and for the Southern District of Illinois according to the statute in such case made and provided, and your petitioner will ever pray etc.

BOSTON WATER & LIGHT COMPANY,
By LEVI DAVIS, *Its Solicitor.*

STATE OF ILLINOIS,
*Madison County, ss:*

Levi Davis, of the City of Alton in the County and State aforesaid being duly sworn, on oath deposes and says that he is the solicitor of the Boston Water and Light Company, one of the defendants in the aforesaid bill of complaint filed by the Farmer's Loan and Trust Company, mentioned in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein mentioned are true as he verily believes.

LEVI DAVIS.

Subscribed and sworn to by said Levi Davis this 5th day of Jan. A. D. 1901, before me.

THOMAS W. SPRINGER,
*Circuit Clerk.*

231 DEFENDANTS' EXHIBIT "C."

And afterwards, towit: on the 7th day of January A. D. 1901 one of the regular days of the October Term A. D. 1900 an order was made and entered of record by said Circuit Court of Madison County, Illinois, in said cause, in words and figures following towit:

In Chancery.

THE FARMERS LOAN AND TRUST COMPANY
vs.
THE NEW ENGLAND WATER WORKS COMPANY, THE BOSTON WATER AND LIGHT COMPANY et al.

Bill to Foreclose Mortgage.

The Boston Water and Light Company, one of the defendants, by its solicitor, having heretofore on this 7th day of January A. D. 1901 presented to the Court its petition, supported by affidavit, for a removal of this cause to the U. S. Circuit Court for the Southern Dist. of Ill. and the Court having heard defendant's said petition and affidavit and having also heard the arguments of Counsel thereon and the court having taken said petition under advisement and having considered the same and being now sufficiently advised in the premises and said defendant having presented its bond with surety as required by law, which bond is hereby approved by the Court, it is therefore considered and ordered by the court, that this cause be removed for hearing to the U. S. Circuit Court for the Southern Dist. of the state of Ill., and the Clerk of this Court is directed to certify the same according to law to said Court.

232 DEFENDANTS' EXHIBIT "D."

An ordinance granting to the Boston Water & Light Company the right to build and maintain a water works system, and to supply water in the village of Upper Alton; and in making a contract with said company for a supply of water for public and private purposes.

Be it ordained by the President and Board of Trustees of the Village of Upper Alton, Madison County, State of Illinois:

SECTION ONE. There is hereby granted to the Boston Water & Light Company (hereinafter called "Company"), a corporation organized and existing pursuant to the laws of the State of Maine, its successors and assigns, the exclusive right and privilege to lay down, continue and maintain water pipes, valves, hydrants and other apparatus for the conveyance and distribution of water in, upon, along and through the streets, avenues, alleys and other public places of the Village of Upper Alton, and additions thereto, and to supply with water the said Village and the inhabitants thereof.

SECTION TWO. The said Company shall, as soon as practicable, after its acceptance in writing of this Ordinance, proceed to lay its water pipes in and through the streets and public places of said Village, as follows:—the said lines of pipe being hereinafter referred to as "original lines" the location of said lines of pipe or water mains, and of the water hydrants hereinafter mentioned, shall be the same are marked and shown on the map of said Village hereto
233 attached, which map is hereby made a part of this instrument, and designated as "Exhibit A" and the sizes of said water pipes are also designated on said map; and the water works system provided for in this ordinance shall be completed by the first day of September, A. D. 1899:—and if said water works system is not so completed by said time, this Ordinance shall thereupon become null and void.

SECTION THREE. There shall be set upon said "original lines" of pipe mentioned in Section Two (2) hereof, Twenty (20) hydrants and for a period of five (5) years from and after the date when the said Company shall have notified the said Village that the said 20 hydrants have been set and are ready for use, there shall be set on said "original lines," at such places as the Board of Trustees of said Village shall designate, Two (2) additional hydrants per annum;—and in case the said Village shall request said Company to extend the "original lines" of pipe, there shall be set an additional hydrant for every five hundred (500) feet of such extension, provided however, that no extension shall be required unless there shall be upon that part of each street upon which extensions shall be so ordered, at least an average of six (6) buildings for every five hundred (500) feet, the owners or occupants of which shall first agree in writing to use and pay for water to be furnished by said Company:—

SECTION FOUR. The said Company shall furnish to the said Village for public purposes, and to such of the inhabitants as
234 shall desire to become water takers under the rules and regulations of said Company, filtered water taken from the Mississippi River, at the location of the pumping station of said Company, at or near the foot of Grand Avenue, west of Bluff Street, in the City of Alton. The rates charged to private consumers by said Company for water shall be the same at all times as is charged by said Company to private consumers for like service in the City of Alton. To prevent the waste of water the said Company may, at its pleasure, require any private consumer to place upon his premises a meter of the kind approved by the Company, and to pay meter rates as fixed in the annexed schedule:—

SECTION FIVE. The said Company shall at all times during the continuance of the Contract therefor, keep and supply all hydrants that may be set pursuant to this Ordinance, with an abundant supply of water for fire purposes, and shall at all times within ten (10) minutes after notice shall have been given at the said pumping station, of an alarm of fire, and during the continuance of such fire, keep and maintain pressure of not less than One Hundred and Forty (140) pounds at the pumping station, and forty-five pounds at any

of said hydrants:—in case of failure on the part of said Company to furnish at any fire, within ten (10) minutes after the receipt of such notice, the pressure herein provided for, unavoidable accidents and casualties excepted, the said Company shall forfeit to the said Village one tenth of the total hydrant rental for one year. The said Company shall furnish, free of charge, Water for all public schools and public buildings of said Village, and for two (2) Public
235 Water Troughs located on the "original lines" of water mains, and at any time during the period of this contract, said Village may require said Company to furnish free water for a public fountain, to the amount of One Hundred Gallons per hour, not to exceed ten hours per day during the summer season:—

SECTION SIX. In consideration of the agreement to lay said water pipes, and in consideration of the other agreements to be performed by the said Company, as set forth in Section Five (5) hereof, the said Village hereby contracts with and agrees to pay to the said Company, its successors and assigns, for the use of each and every hydrant which may be set pursuant to this Ordinance, the sum of Fifty Dollars ($50) per annum, the said rental to begin to accrue at such times as the said Company shall notify the said Village that the hydrants are set and ready for use, provided however, that the rental of the first twenty hydrants mentioned in Section Two shall not begin to accrue until the date when the public test shall have been made pursuant to the terms prescribed in Section Thirteen, and said rental shall be due and payable to said Company at its office in the City of Alton, Illinois, semi-annually thereafter, and shall continue for the full period of twenty-five years from and after the date when the said Company notifies the said Village that the first twenty hydrants to be set upon the "original lines" are ready for use:

SECTION SEVEN. The fire hydrants provided for in this Ordinance shall not be used for any other purpose than for fire purposes
236 and testing, and the opening and closing of such hydrants shall be under the exclusive direction of the Chief of the Fire Department, and such persons as he may appoint, and the officers and agents of said Company, and the said Village shall be liable for any damage done to the said fire hydrants by any officer or agent of said Village: provided however, that the said Village shall have the right to use said fire hydrants for flushing gutters and sewers for a period not to exceed one (1) hour per day, for any hydrant, this use of said hydrants to be under the direction of the Street Commissioner of said Village, or other duly authorized officer; all fire hydrants and sprinkling hydrants shall be closed, when not in actual necessary use, and in times of fire no hydrant shall be used in any place for flushing or sprinkling purposes, to the detriment of the fire service; nor shall the said Village suffer or permit undue waste of water from any hydrant:—

SECTION EIGHT. The right of all persons under license from said Company desiring to excavate the streets to connect with the mains of said Company under such proper and reasonable rules as shall be prescribed by said Company shall not be inhibited by said Village:

SECTION NINE. The said Company, its successors and assigns shall

at all times, save and hold said Village harmless of and from all loss, cost or damage to person or property occasioned by any negligence in the excavation of any street, lane, alley or public place within said Village made by it in laying or repairing any of its mains, pipes, valves, or any other apparatus, and whenever said
237 Company, its successors and assigns, shall open or cause to be opened any street, lane, alley or public place for laying any main, pipe, valve or hydrant or other apparatus, it shall forthwith at its own expense, restore the same to as good condition as the same was in before any such opening, and in case of any failure so to do for a space of 48 hours after the laying of such main, pipe, hydrant, valve or other apparatus, shall be completed, notice shall be given to the said Company so to do by the officer for the time having charge of the streets in said Village, and in case of default for 24 hours after service of such notice, the said street may be put in such order by said Village, at the expense of said Company:

SECTION TEN. The act of God, unavoidable accidents, interference of rioters, or other unlawful disturbances, or the failure of said Village to perform any of its agreements in this Ordinance contained, shall excuse any defaults by the said Company in the furnishing of any water in the Ordinance provided to be furnished for the time being:

SECTION ELEVEN. The said Company being charged with a public duty, the said Village shall pass such Ordinances as will prohibit all unlawful interference with its operations, pollution of its water supply, trespass upon its property and unauthorized use of hydrants:

SECTION TWELVE. All mains, pipes, valves and other apparatus which may be provided by said Company or its successors or assigns pursuant to this Ordinance, shall remain the sole and absolute property of the said Company, its successors and assigns:

238 SECTION THIRTEEN. Whenever the pipe lines mentioned in Section Two hereof, shall have been laid and the 20 hydrants set thereon ready for use, the said Company shall notify the President or Clerk of the Board of Trustees of said Village, and thereupon, within ten (10) days thereafter, at such time as the said Company may designate, there shall be a public test of the capacity of said water works. And said Company agrees that at said test, it will, unavoidable accidents excepted, throw three (3) streams through three (3) lines of two and a half inch hose, not more than one hundred feet in length, with one (1) inch ring nozzles, seventy-five (75) feet high, not more than Two (2) of such lines of hose to be connected with any one line of pipe:

SECTION FOURTEEN. This Ordinance shall become a contract between the said Village of Upper Alton, and the Boston Water & Light Company, its successors and assigns, whenever within sixty days after its passage, the said Company shall file with the Clerk of the Board of Trustees of said Village a written acceptance of the terms of this Ordinance.

SECTION FIFTEEN. The said Village shall have the right and option to take and purchase all the property of said Company, its successors and assigns, located and placed in said Village and remain-

ing therein, from the said Company, its successors and assigns, at any time after six months before the termination of said twenty-five years, by giving notice in writing to said Company, its successors or assigns, of its desire to avail itself of such right or option; whereupon said Village shall select one appraiser, said Company, its suc-
239 cessors or assigns shall select another appraiser, and the two appraisers so selected shall choose a third appraiser, and the three appraisers so selected and chosen, shall proceed at once to value all the said property when on hand belonging to said Company, its successors or assigns, and the decision of said appraisers, or of the majority of them, shall be binding in all parties in interest, as to the price of said property, and the said appraisers, or a majority of them, shall make a statement in writing of their appraisement or valuation, to the said Village and to the said Company, its successors or assigns, and upon payment of such amount so ascertained by said appraisers within 90 days after receiving said statement from said appraisers by the said Village, the said Company, its successors or assigns, shall at once deliver to said Village all said property appraised as aforesaid, from the time of said payment, all the said property and all profits to be derived therefrom, shall belong to said Village, and all expenses connected with said appraised property are to be paid by said Village, and after said appraisement of said property shall have been made pursuant to the terms of this Ordinance, the said Village shall not have the right to decline to purchase said property at the price so determined by said appraisement.

Schedule of Meter Rates to be charged by the Boston Water & Light Company, its successors and assigns, pursuant to Section Four of an Ordinance adopted by the Village of Upper Alton,
240 granting to said Company the right to build and operate water works in said Village.

| | Cts. |
|---|---|
| 100 Gallons to 500 Gallons per day per 100 Gallons..... | 5 |
| 500 Gallons to 1,500 Gallons per day per 100 Gallons..... | 4 |
| 1,500 Gallons to 3,000 Gallons per day per 100 Gallons..... | 3½ |
| 3,000 Gallons to 5,000 Gallons per day per 100 Gallons..... | 3 |
| 5,000 Gallons to 10,000 Gallons per day per 100 Gallons.... | 2½ |
| 10,000 Gallons and more per day per 100 Gallons..... | 2 |

We, the undersigned, President and Clerk respectively of the Board of Trustees of the Village of Upper Alton, Illinois, do hereby certify that the foregoing is a full, true and correct copy of the Ordinance passed by said Board of Trustees November, 1898, as amended by Ordinance passed November 30 and December 27, 1898.

[SEAL.] (Signed) A. F. ROGERS,
*President Board of Trustees.*

Attest:

P. S. WEBSTER, *Clerk.*

Office of Boston Water & Light Co.,
8 Congress St., Boston, Mass.

To the Board of Trustees of the Village of Upper Alton, States of Illinois.

GENTLEMEN: This Company hereby accepts the terms of a certain ordinance passed by your Board on the first day of November,
241 A. D. 1898, as amended on the 30th day of November, 1898, and on the 27th day of December, 1898; said Ordinance being entitled "An Ordinance granting to the Boston Water & Light Company, the right to build and maintain a water works system and to supply water in the Village of Upper Alton," and making a contract with said Company for a supply of water for public and private purposes.

Respectfully yours,

BOSTON WATER & LIGHT COMPANY.
By C. H. VENNER, *President.*

Attest:

GEORGE L. VENNER, *Secretary.*

We, A. F. Rogers, President and P. S. Webster, Clerk of the Board of Trustees of the Village of Upper Alton, Illinois, do hereby certify that the foregoing is a correct copy of the acceptance by the Boston Water & Light Company of the Ordinance therein referred to, and that the same was received and filed on the 28th day of January, 1899.

[SEAL.] (Signed) A. F. ROGERS,
*President Board of Trustees.*

Attest:

P. S. WEBSTER, *Clerk.*

Afterwards, to-wit, on said eleventh day of February of the year last aforesaid, came again the defendants James Hamilton Lewis and Elijah N. Zoline by Elijah N. Zoline, Esq., their solicitor and file their joint and several answer to the bill of complaint herein, and also come the C. H. Venner Company and Cidele Venner by Elijah N. Zoline, Esq., their solicitor and file their separate answers to the bill of complaint herein as follows, to-wit:

242 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

*The Joint and Several Answer of James Hamilton Lewis and Elijah N. Zoline, Defendants Herein, to the Bill of Complaint of the Alton Water Company, Complainant.*

1. These defendants reserving to themselves all right of exception to the jurisdiction of this court as a federal court over the subject-matter herein and over the persons of these defendants, but expressly insisting that this honorable court is without jurisdiction as a federal court over the subject-matter herein and over the persons of these defendants for the various reasons hereinafter set forth for answer to the bill of the said Alton Water Company say:

243 2. That they have no interest in the subject-matter of the suit except as the attorneys for the complainants in the bill to foreclose filed by them as such attorneys for Allen A. Brown et al. against the present complainants the Alton Water Company in the Madison County circuit court, as set forth in the bill of complaint of the complainant herein.

3. That the preliminary injunction issued by this court against these defendants from proceeding in the aforesaid foreclosure suit in the state court, deprives these defendants of all means of following their occupation and profession in said state court in the aforesaid litigation for reward, and that they are thereby deprived of property and of the liberty to freely practice law in said state court in the aforesaid litigation, within the meaning of the Fifth and Fourteenth amendments of the Constitution of the United States of America. And these defendants ask this honorable court to so hold, and give them the benefit of the aforesaid provisions of the Constitution of the United States, and dismiss the aforesaid action against them, the same being unwarranted by the facts in this case.

4. And further answering these defendants aver that they have read the Joint and Several answer *Answer* filed herein by Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin

Warren, William B. Trask, Harriett N. Houghton, Charles M. Page, James Schouler and George W. Fairbank, Defendants. And thereupon they further say that they do hereby adopt the aforesaid answer of the said Allen A. Brown, et al. so filed herein, and make said answer their own. And that these defendants further say that they deny all and all manner of unlawful combination and confederacy charged in said bill; without this, that there is any other matter, cause or thing in the said complainant's bill of complaint, material or necessary for these defendants to make answer unto, and which are not herein and hereby well and sufficiently answered, con-
244 fessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JAMES HAMILTON LEWIS AND
ELIJAH N. ZOLINE,
By ELIJAH N. ZOLINE.

(Indorsed:) Filed October 11, 1909. James T. Jones, Clerk.

245 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

*The Answer of the C. H. Venner Company, a New Jersey Corporation, to the Bill of Complaint of the Alton Water Company, Complainant.*

1. This defendant reserving to itself all right of exception to the jurisdiction of this court as a federal court over the subject-matter herein and over the person of this defendant, but expressly insisting that this honorable court is without jurisdiction as a federal court over the subject-matter herein and over the person of this defendant for the various reasons hereinafter set forth for answer to the bill of the said Alton Water Company says:

246 2. This defendant avers that it read the joint and several answer of Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, Wiliam B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler and George W. Fairbank, and adopts the said answer as its own. That it is the same C. H. Venner Company, incorporated, which is mentioned in the aforesaid answer as being the owner and pledger of fifty-six (56) bonds of One thousand (1,000) dollars each, executed by the Boston Water & Light Company, and secured by trust deed covering the property described in the said trust deed so executed by the said Boston Water & Light Company to the International Trust Company, trustee, which bonds this defendant has duly pledged to Cidele Venner of New York as pledgee, as collateral security for a certain debt contracted by the C. H. Venner Company to the said Cidele Venner, and that the said Cidele Venner is now the holder of the said bonds as pledgee of same.

3. This defendant further answering denies that the complainant is entitled to any relief in the premises, or any part thereof, and prays to be dismissed with its just costs and charges most wrongfully sustained.

[SEAL.] C. H. VENNER COMPANY,
By CHAS. E. ROBINSON, *Secretary.*
JAMES HAMILTON LEWIS AND
ELIJAH N. ZOLINE,
*Attorneys for C. H. Venner Co.*

(Indorsed:) Filed February 11, 1909. James T. Jones, Clerk.

247 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Harry A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

*The Answer of Cidele Venner to the Bill of Complaint of The Alton Water Company, Complainant.*

This defendant reserving to herself all right of exception to the jurisdiction of this court as a federal court over the subject-matter

herein and over the person of this defendant, but expressly insisting that this honorable court is without jurisdiction as a federal court over the subject-matter herein and over the person of this defendant for the various reasons hereinafter set forth, for answer to the bill of the said Alton Water Company, says:

248 2. This defendant avers that she read the joint and several answer of Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler and George W. Fairbank, and adopts the said answer as her own.

3. Further answering this defendant avers that she is the same Cidele Venner who is mentioned in the aforesaid Joint Answer of Allen A. Brown, et al., and is the pledgee of fifty-six (56) bonds of the Boston Water & Light Company secured by a trust deed to the International Trust Company as in said answer appears, which bonds were pledged to her by the C. H. Venner Company, a New Jersey corporation, one of the defendants herein, for a valuable consideration, and to secure an original loan of $31,000 from the said Cidele Venner, which loan had been increased from time to time until on December 23, 1903, it amounted to $35,659.15, no part of which has since been paid.

4. This defendant further answering denies that the complainant is entitled to any relief in the premises, or any part thereof, and prays to be dismissed with her just costs and charges most wrongfully sustained.

CIDELE VENNER,
By ELIJAH N. ZOLINE,
*Her Attorney.*

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,
*Att'ys for Cidele Venner.*

Indorsed: Filed February 11, 1909, James T. Jones, Clerk.

249 In the Circuit Court of the United States, Southern District of Illinois, Southern Division.

In Chancery. No. —.

ALLEN A. BROWN et al.
**ats.**
ALTON WATER COMPANY.

*Exceptions by Complainant to the Answer of Brown, Hodgkins, Evans, Wason, Warren, Trask, Houghton, Page, Schouler, and Fairbank for Scandal and Impertinence.*

First. For that the said answer is impertinent from and including the words "of these bonds so issued" in paragraph 17 of said answer to the end of said paragraph.

Second. For that the first three sentences of paragraph 17 in said answer are impertinent.

Third. For that paragraph 19 of said answer is impertinent.

Fourth. For that paragraph 20 of said answer is impertinent.

Fifth. For that paragraph 22 of said answer is impertinent.

Sixth. For that paragraph 23, except the first sentence thereof is impertinent.

Seventh. For that paragraph 24 of said answer is impertinent.

250 Eighth. For that that part of paragraph 25 is impertinent which says that defendants "deny that the evidence justified the entry of the decree or decrees aforesaid," and also that part of said paragraph beginning with the words "but aver that" and continuing to the end thereof.

Ninth. For that paragraph 26 of said answer (except the first sentence thereof) is impertinent.

Tenth. For that paragraph 27 of said answer is impertinent.

Eleventh. For that paragraph 29 of said answer is impertinent.

Twelfth. For that paragraph 30 of said answer is impertinent.

Thirteenth. For that paragraph 31 of said answer is impertinent.

Fourteenth. For that paragraph 5 of said answer (except the second sentence thereof) is impertinent.

Fifteenth. For that the second sentence of paragraph 5 of said answer is impertinent.

Sixteenth. For that paragraph 18 of said answer is impertinent.

In all which particulars complainant excepts to the said answer of said defendants as scandalous or impertinent, and insists that the same ought to be expunged from the said answer.

WM. BURRY,
LEVI DAVIS,
*Solicitors for Complainant.*

(Indorsed:) Filed April 30, 1909. James T. Jones, Clerk.

251 And afterwards to-wit, on the 13th day of May, at the January Term of said Court, in the year of our Lord one thousand nine hundred and nine, the following further proceedings were had in said court in said case and entered of record to-wit,

In Chancery.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN et al.

On this day come the parties and on complainant's motion leave was given it to file an amendment and supplement to its bill instater, which is done.

On motion of defendants, who have answered, it was ordered that their answers on file, stand to the bill as so amended.

On motion of complainant it was ordered that its exceptions on file stand to the answers on file.

Thereupon there came on for consideration said exceptions, and after hearing counsel in support of and against said exceptions, the Court overruled all of said exceptions.

Thereupon on motion of all parties who have appeared, this cause was set down for hearing upon bill and answer.

252 In the Circuit Court of the United States, Southern District of Illinois, Southern Division.

In Chancery. No. —.

ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee, et al., Defendants.

*Amendment and Supplement to the Bill of Complaint.*

Now comes said complainant, and by leave of court for this purpose first had and obtained, files this, its amendment and supplement to the bill of complaint filed herein on July 13, 1907, and respectfully shows that:

1. The removal of said consolidated cause was ordered by said state court upon the petition of the Boston Water & Light Company for the removal of said cause to this court, which petition is shown as exhibit "B" to the answer of Brown and others filed in this cause. After said cause had been so removed, said Farmers' Loan and Trust Company on January 17, 1902, filed its motion in this court in said cause that said suit be remanded to the state court.

On April 2, 1902, the motion to remand came on for hearing and after arguments and consideration by the court, said motion was denied and the following order was entered:

253 "And thereupon came on for consideration the motion of the Farmers' Loan and Trust Company to remand this cause to the State Court, and said motion was opposed by Mr. Davis, Mr. Baker and Messrs. Patton, Hamilton & Patton in behalf of the parties for whom they appear and after hearing suggestions the Court overruled said motion to remand."

Prior to the entry of said order, Mr. Davis, referred to in said order, had appeared in said cause on March 15, 1901, for the International Trust Company; on January 4, 1901, for the Boston Water & Light Company, and on March 19, 1901, for the United Water Works Company and the Alton Water Works Company; Mr. Baker had appeared on June 17, 1901, for the American Loan & Trust Company and on April 17, 1901, for the New England Company; and Messrs. Patton, Hamilton & Patton had appeared, on April 10, 1901, for the defendant, Lyman. The International Trust Company therefore united with said other defendants in opposing the motion to remand.

2. An appeal was taken by the defeated parties, including the International Trust Company, from the main foreclosure decree entered in the litigation, and the case was docketed as No. 1073 in the Circuit Court of Appeals for the Seventh Circuit. On that appeal the International Trust Company and other appellants assigned for error "that the said Circuit Court erred in refusing to remand this cause to the Circuit Court of the State of Illinois for Madison County," and insisted that the federal court had no jurisdiction in the cause. Those contentions were overruled and the decree affirmed. Thereupon, the same appellants, including the International Trust Company filed two petitions (Nos. 558 and 559) in the Su-
254 preme Court of the United States at the October Term, 1904, for writs of certiorari to review the adjudication of the Circuit Court of Appeals last referred to. The principal points urged in support of those petitions were the same points, that the Circuit Court erred in denying the motion to remand and that the federal court had no jurisdiction in the cause. The petitions for writs of certiorari were denied on April 3, 1905 (197 U. S., 622).

And by way of supplement to said original bill, complainant further shows that:

3. Since the filing of the original bill in this cause, said defendants have pressed for hearing before said Circuit Court of Madison County the foreclosure bill filed in that court on or about June 10, 1907, as set forth in the original bill of complaint herein. Said cause came on in said Madison County Circuit Court to be heard upon said foreclosure bill of complaint and upon a plea of res judicata interposed by your orator setting up that all the matters therein involved had been adjudicated in the original foreclosure proceedings instituted by the Farmers' Loan and Trust Company in said Madison County and afterwards removed to this court, and in which the said original foreclosure decree was entered. After full hearing said state Circuit Court held the plea sufficient. Thereupon the complainants in that court (defendants herein) elected to stand by their bill, and thereupon a final decree was entered in said state court in April, 1908, dismissing said foreclosure bill for want of equity, and a copy of said final decree is hereto attached as Exhibit "D." An ap-
255 peal allowed in said final decree of the state Circuit Court was never perfected, but on the contrary was abandoned. Complainants in that state court suit (defendants herein) afterwards sued out a writ of error from said final decree in said state court and have filed a transcript of record in connection therewith in the Appellate Court of Illinois for the Fourth District, but have not obtained any supersedeas, thereon, and said writ of error is now stayed by the injunction heretofore granted herein.

WM. BURRY,
LEVI DAVIS,
*Solicitors for Complainant.*

EXHIBIT D.

Madison County Circuit Court, March Term, 1908.

No. 22.

ALLEN BROWN et al.
vs.
ALTON WATER CO. et al.

On this 11th day of May came on for hearing the demurrer filed herein to the supplemental bill filed March 11, 1908, and after hearing arguments, the Court sustained said demurrer and complainants elect to stand by their said supplemental bill.

Thereupon said complainants moved the court for leave to withdraw the replication filed by them to the plea filed by certain defendants on Jan'y 10, 1908, and the court granted said motion and complainants declared their election to stand by their objection to the sufficiency of said plea.

Thereupon the cause coming on for further hearing, the court after hearing Counsel, ordered, adjudged and decreed, that the original bill and the supplemental bill be and the same are hereby dismissed for want of equity at the cost of complainants.

256 Thereupon the complainants severally prayed an appeal from said decree to the Appellate Court of the 4th District of Illinois which is allowed by the Court to each of the said complainants either individually or jointly at their election upon the complainants or either of them filing an appeal bond conditioned to pay the costs of the said appeal in the sum of $250.00 within 60 days from date to be approved by the Clerk of this Court.

Approved:
CHAS. T. MOORE, *Judge.*

STATE OF ILLINOIS,
*Madison County, ss:*

I, J. A. Barnett, Clerk of the Circuit Court within and for the County and State aforesaid do hereby certify that the foregoing is a true and complete copy of the Order Sustaining Plea Sufficient and Dismissing Bill in a cause lately pending in our said Court on the Chancery side wherein Allen A. Brown, Trustee et al., were complainants and Alton Water Company et al., were defendants, as the same now appears of record in our said Court in Chancery Record #7, Page 168.

In witness whereof I have hereunto signed my name and affixed the seal of said Court at Edwardsville, this 11th day of May, A. D. 1909.

[SEAL.] J. A. BARNETT,
*Circuit Clerk.*

(Indorsed:) Filed May 13, 1909. James T. Jones, clerk.

257 In the Circuit Court of the United States, Southern District of Illinois, Southern Division.

FRIDAY, *May 28th, A. D.* 1909.

Present: Hon. J. Otis Humphrey, District Judge.

ALTON WATER COMPANY
vs.
ALLEN A. BROWN, Trustee, et al.

*Final Decree.*

It appearing to the court, from returns now on file in this cause, that Frank Drumgoole, C. A. Damon, George F. Lovett and George W. Sumner and Chester B. Sumner, as executors of the estate of William Sumner, deceased, were duly served with a copy of the order to appear, entered in this cause on July 13, 1907; and it further appearing to the court, from certificates filed in this cause, that said defendants Joseph C. Foster, M. C. Grier, James Howe, Vernon Prouty, Alice F. Page and John Farquhar, as administrator of the estate of Benjamin F. Dudley, deceased, have been duly brought into court by publication of notice of this suit in accordance with the order entered in this cause on August 23, 1907; and that all said defendants mentioned in this paragraph have not appeared herein but have made default, and that such default has continued for more than one year; it is now, on complainant's motion, ordered, adjudged and decreed that the bill of complaint filed herein as amended be
258 and the same is hereby taken and confessed by and against each of the defendants mentioned in this paragraph.

And this cause, on motion of complainant and with the consent of defendants who have answered, having been heretofore set down for hearing on the bill and answers thereto filed herein, came on for hearing upon the bill and answers and the default of certain defendants, and was argued by counsel and considered by the court;

And thereupon it was ordered, adjudged and decreed that the order for temporary injunction heretofore entered in this cause be and the same is hereby made perpetual, and each and all of the defendants in this cause and their attorneys and agents be and they are each of them hereby enjoined from the further prosecution of said suit commenced on or about June 10, A. D. 1907, by said Allen A. Brown, trustee, and other of said defendants in the Circuit Court of Madison County, in the State of Illinois, against the Boston Water & Light Company, the International Trust Company, the Alton Water Company and others, and which prays for a foreclosure of a certain mortgage trust deed made by the Boston Water & Light Company to the International Trust Company, dated in October, 1897, and recorded in the recorder's office of Madison County, in book 253 of records at page 82; and they are also enjoined and restrained from at any time hereafter beginning any other suit or proceeding for, or taking any steps looking to, the foreclosure of said mortgage trust deed to said International Trust Company; and such of said defendants as have heretofore sued out a writ of error from the decision of

said Circuit Court of Madison County on the suit so as aforesaid brought by them to foreclose said mortgage trust deed to the
259 International Trust Company, are hereby directed, commanded and required, within thirty days from the entry of this decree, to dismiss said writ of error now pending in the Appellate Court for the Fourth District of Illinois.

It is further ordered that said defendants, Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schoulder, George W. Fairbank, James Hamilton Lewis, Elijah N. Zoline, C. H. Venner Co. and Cidele Venner, who have appeared and answered herein, and each of them, are liable for the costs of this suit, to be taxed by the clerk; that the defendants last aforesaid pay such costs within thirty days from the entry of this decree, and that in default thereof execution issue against them for the collection of said costs.

And thereupon the defendants who have appeared herein presented to the court a petition for an appeal from this decree to the Supreme Court of the United States and also an assignment of errors in connection with said petition, and it was ordered that said petition be granted and the appeal allowed to the Supreme Court of the United States of America from this decree, that the amount of bond on said appeal be and is hereby fixed at the sum of five hundred dollars ($500); and that a certified transcript of the record of these proceedings be forthwith transmitted to said Supreme Court of the United States.

And thereupon said petitioners and appellants presented to the court their appeal bond, with the American Surety Company as surety, which bond was approved by the court and ordered filed.

260 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

*Certificate.*

Be it remembered that on the 14th day of May, 1909, the aforesaid entitled cause came on for hearing upon the bill of complaint

herein of The Alton Water Company and the answers thereto on file of the defendants Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairbank, C. H. Venner Company, a corporation, Cidele Venner, James Hamilton Lewis and Elijah N. Zoline as by the record duly appears; said cause having been set down for hearing upon said
261 bill and answers by the complainant herein.

And thereupon Elijah N. Zoline, Esq., in behalf of himself and as solicitor for the other defendants herein, for whom answers have been filed, as aforesaid, challenged the jurisdiction of this Court as a Federal Court to hear and determine said cause for the reasons as set forth in the answer and denied in general the right and power of this Court as a Federal Court to hear and determine the aforesaid cause; and this Court after hearing the arguments of counsel and being fully advised in the premises denied said motion and held that it has jurisdiction over the subject matter and the parties hereto by virtue of the mandate of the United States Court of Appeals for the Seventh Circuit as by the record duly appears. To which ruling of the Court the said counsel for the respective defendants then and there duly excepted.

And thereupon the hearing proceeded before this Court upon the Bill and answers, as aforesaid, and no other evidence was heard by the Court or submitted by the parties hereto.

And thereupon the Court, after hearing the arguments of counsel, held that the facts stated in the answers do not constitute a sufficient defense in law to the cause of action of the complainants, and that no constitutional guarantees or privileges of the defendants as set forth in their answers were violated by the entering of the
262 decree set forth in the bill and answer, and that the defendants were not deprived of their property without due process of law in violation of the Federal Constitution. To which rulings and holdings of the Court the defendants then and there by their counsel duly excepted.

And thereupon the Court ordered that a decree may be entered as prayed for in the bill of complaint herein. To which ruling of the Court the defendants by their counsel then and there duly excepted.

HUMPHREY, [SEAL.]
*U. S. District Judge, Presiding in the Circuit Court of the United States for the Southern District of Illinois.*

(Indorsed:) Filed May 28, 1909. James T. Jones, Clerk.

263 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,

vs.

ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

*Petition for Appeal to the Supreme Court of the United States.*

Now come the above named defendants, Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairbank, C. H. Venner Co., a corporation, Cidele Venner, James Hamilton Lewis and Elijah N. Zoline and respectfully represent that in the record and proceedings in this cause lately pending in this court, and in the final decree in said cause, against these defendants, manifest errors have intervened to the great injury of these defendants and petitioners, which said errors are specifically set forth in the assignment of errors herewith filed.

Wherefore these petitioners respectfully pray that an appeal may be duly allowed herein from this court to the Supreme Court of the United States of America and that the record of the proceedings and decree aforesaid may be removed from this court into the

264 Supreme Court of the United States of America to the end that the same may be in and by said Supreme Court inspected, and revoewed and considered and that the errors aforesaid and each and every of them may be corrected according to law and that a bond may be prescribed and allowed herein, and the amount thereof fixed and the security thereon approved, and that a citation may issue to the said The Alton Water Company according to law and the rules and practice in such cases made and provided.

Respectfully submitted,

JAMES HAMILTON LEWIS AND
ELIJAH N. ZOLINE,
*Attorneys for said Petitioners and Appellants.*

(Indorsed:) Filed May 28, 1909. James T. Jones, Clerk.

265 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

*Assignments of Error Accompanying Petition for Appeal.*

And now come the said Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert E. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairbank, C. H. Venner Company, a corporation, Cidele Venner, James Hamilton Lewis and Elijah N. Zoline, the defendants, praying an appeal herein in accordance with the foregoing petition for appeal and assignment for error herein on the record of this cause, and aver that there is manifest error in the proceedings herein and in the final decree entered in said cause in the following matters, among other things, to-wit:

1. The Circuit Court of the United States for the Southern Judicial District of Illinois has and had no jurisdiction to resume the hearing of this cause upon the mandate issued by the United States Circuit Court of Appeals for the Seventh Circuit, because said United States Circuit Court of Appeals itself had under the
266 law no jurisdiction to review the record in this cause presenting the single question of the Jurisdiction of the United States Circuit Court for the Southern District of Illinois as a federal court over the subject matter and the parties in the suit of The Alton Water Company vs. Allen A. Brown as from said mandate and the record of this cause more fully appears, reference thereto being had. The judgment of reversal and remandment of the said United States Circuit Court of Appeals being void for want of jurisdiction, the decree of this Court dismissing the suit of The Alton Water Company for want of jurisdiction remains in full force and effect, and the United States Circuit Court for the Southern District of Illinois had no power at this term to exercise any jurisdiction over the subject matter and the parties to this suit.

2. The Circuit Court of the United States erred in not holding that it had no jurisdiction as a federal court over the subject matter and

the parties in this cause upon the grounds set forth in the several answers of these defendants and appellants and in disregarding the objections made orally at the hearing of this cause by counsel for these defendants as to the jurisdiction of said court in overruling each and every contention regarding such jurisdiction as set forth in the answers of these defendants, reference thereto being made.

3. The said Circuit Court erred in taking jurisdiction of this cause and in not holding that the bill of complaint herein falls within the inhibition contained in Section 720, Revised Statutes of the United States, expressly prohibiting the federal courts from issuing *issue* injunctions to restrain proceedings in state courts.

267 4. The said Circuit Court erred in holding that the bill of The Alton Water Company in this cause against the defendants and appellants is an ancillary bill instead of an original bill.

5. That the Said Circuit Court erred in refusing to hold that it had no jurisdiction to hear and determine the suit of the Farmers' Loan and Trust Company vs. The New England Water Works Company, The Alton Water Works Company, The American Loan and Trust Company, trustee, and the United Water Works Company, et al. as is more fully identified in the bill and answer in this cause on the ground that said cause was illegally and improperly removed from the Madison County Circuit Court to the said United States Circuit Court for the Southern District of Illinois, said cause not being a removable cause within the meaning of the law in such cases made and provided, and not having been removed until after answer was filed by the removing defendant.

6. The Court erred in not holding that the decrees entered by the Circuit Court of the United States for the Southern District of Illinois on December 23, 1903, and the decree of the same court entered on May 5, 1905, in the said suit of the Farmers' Loan and Trust Company against the New England Water Works Company, The Alton Water Works, The American Loan and Trust Company, trustee, The United Water Works Company, Ltd., The Boston Water and Light Company, and The International Trust Company, et al., as set forth in the bill of complaint and answer herein and illegally and improperly removed into said court from the Madison County Circuit Court of Illinois,—are void and are inoperative as against the rights of these defendants, because they were not made parties to said suit and were not brought into court in any manner as required by the constitution and laws of the State of Illinois

268 and by the law of the land, and had no notice whatever of the hearing thereof or of the pendency of said suit as more fully appears in the answers of these defendants on file in this cause, reference thereto being had; and that, therefore, these defendants and appellants were deprived of their property by the said decrees without due process of law in violation of the fifth and the fourteenth amendments of the constitution of the United States of America, said constitutional privileges having been fully claimed and set up in said answers filed by these defendants in said cause, reference thereto being had.

7. The said Circuit Court of the United States erred in not hold-

ing that these defendants were necessary and indispensable parties to the foreclosure in the said suit of the Farmers' Loan and Trust Company vs. the said New England Water Works Company, et al., and that the constitutional enactments and statutes of the state of Illinois and the decisions of the Supreme Court of Illinois are a part and parcel of the trust deed of The Boston Water and Light Company to the International Trust Company, trustee, and constitute a contract within the meaning of Section Ten of Article One of the Constitution of the United States of America, which the courts of the United States are bound to respect and enforce; and that by reason of the said law of Illinois these defendants and appellants were entitled to have notice of the said foreclosure proceedings to protect their property and to be heard upon their contentions in this behalf; and that the failure to make these defendants and appellants parties defendant to said cause operated to deprive these defendants and appellants of their property without due process of law contrary to the Constitution of the United States of America and the amendments thereto.

269 8. The Court erred in not holding that the said decrees are void, because they were made and entered wholly outside and in excess of the issues made and presented in said cause between the parties litigant, to-wit; The Farmers' Loan and Trust Company, The Boston Water and Light Company and The International Trust Company, trustee, as set forth in the twenty-sixth, twenty-seventh and twenty-eighth paragraphs of the answer of these defendants, reference thereto being had, and because said Circuit Court adjudicated conflicting and adverse rights of the claims to title between the Farmers' Loan and Trust Company, The Boston Water and Light Company and The International Trust Company, trustee, whereas, said bill of the said Farmers' Loan and Trust Company was in substance merely a bill for foreclosure and accounting and had no allegations appropriate to justify the entering of the decree of sale in the manner and form as was entered in said cause; that therefore said decree of sale and the order confirming said sale took the property of these defendants and appellants which was never acquired, owned or mortgaged by the Alton Water Works Company without due process of law and in violation of the fifth and fourteenth amendments to the Constitution of the United States of America.

9. The Circuit Court erred in not holding that under the admitted facts as set forth in the answer it is inequitable to enforce against these defendants the said decrees entered in said Circuit Court of December 23, 1903, and May 5, 1905, the equities being entirely with these defendants.

10. The said Circuit Court erred in holding and deciding that the facts stated in the several answers filed by these defendants in this cause were not sufficient to constitute a defense to the cause of action in the complaint of the said The Alton Water Company, complainant herein.

270 11. The said Circuit Court erred in not granting to these defendants the constitutional privileges claimed by these defendants in the answers filed in this cause.

12. The said Circuit Court erred in entering the decree in this cause and in enjoining these defendants in the manner and form as set forth in the decree now appealed from and in entering judgment for costs against these defendants, and in granting the relief prayed for in the bill of complaint herein.

13. That the final decree entered in the above entitled cause deprives these defendants and appellants of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and makes it impossible for them by any legal process to secure their rights in any court of law or equity in the land.

Wherefore, the above named defendants and appellants herein by reason of the errors aforesaid pray that the decree entered against them in the above entitled cause may be reversed and held for nought.

JAMES HAMILTON LEWIS AND
ELIJAH N. JOLINE,
*Attorneys for the Above-named Defendants and Appellants.*

(Indorsed:) Filed May 28, 1909. James T. Jones, Clerk.

271 In the Circuit Court of the United States in and for the Southern Judicial District of Illinois.

In Equity.

THE ALTON WATER COMPANY, Complainant,
vs.
ALLEN A. BROWN, Trustee; ROBERT B. WASON, HARRIET N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, Executors of the Estate of Wm. Sumner, Deceased; James Howe, Orrin Warren, Alice S. Page, John Farquhar, Administrator of the Estate of Benjamin F. Dudley, Deceased; George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, Defendants.

Know all men by these presents, that we, Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairfax, C. H. Venner Company, a corporation, Cidele Venner, James Hamilton Lewis and Elijah N. Zoline, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto The Alton Water Company, a corporation, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said The Alton Water Company, its attorneys, executors, administrators or assigns, to which payment, well and truly to
272 be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of May in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at the session of the Circuit Court of the United States for the Southern District of Illinois in a suit pending in the said court between the Alton Water Company, complainant, and Allen A. Brown, trustee, Robert B. Wason, Harriet N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles M. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner and Chester B. Sumner, executors of the estate of Wm. Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, defendants; and the said Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairbank, C. H. Venner Company, a corporation, Cidele Venner, James Hamilton Lewis and Elijah N. Zoline having obtained from said Court an order allowing an appeal to the Supreme Cou-t of the United States of America to
273 reverse the decree of the aforesaid suit and a citation directed to the said The Alton Water Company is about to be issued citing and admonishing it to be and appear at the Supreme Court of the United States of America to be holden at the City of Washington, District of Columbia.

Now, the condition of the above obligation is such that if the said Allen A. Brown, Sabra Hodgkins, Mary A. Evans, Robert B. Wason, Orrin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler, George W. Fairbank, C. H. Venner Company, a corporation, Cidele Venner, James Hamilton Lewis and Elijah N. Zoline shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

ALLEN A. BROWN,
SABRA HODGKINS,
MARY A. EVANS,
ROBERT B. WASON,
ORRIN WARREN,
WILLIAM B. TRASK,
HARRIET N. HOUGHTON,
CHARLES M. PAGE,
JAMES SCHOULER,
GEORGE W. FAIRBANKS,
C. H. VENNER COMPANY,
CIDELE VENNER,
JAMES HAMILTON LEWIS AND
ELIJAH N. ZOLINE,
By ELIJAH N. ZOLINE,
*Their Attorney.*

Sufficiency of sureties on the foregoing bond approved this 28th day of May, 1909.

HUMPHREY,
*U. S. District Judge, Presiding in the Circuit Court of the United States for the Southern District of Illinois.*

(Indorsed:) Filed May 28, 1909. James T. Jones, Clerk.

274 UNITED STATES OF AMERICA,
*Southern District of Illinois, Southern Division:*

I, James T. Jones, Clerk of the Circuit Court of the United States in and for the Southern District of Illinois, do hereby certify that the foregoing is a true and complete copy of the papers filed and proceedings thereon had, in a certain cause, wherein the Alton Water Company is complainant, and Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Charles H. Page, George W. Fairbanks, M. C. Grier, Sabra Hodgkins, William B. Trask, Mary A. Evans, James Hamilton Lewis, Elijah N. Zoline, George W. Sumner, and Chester B. Sumner, executors of the estate of William Sumner, deceased, James Howe, Orrin Warren, Alice S. Page, John Farquhar, administrator of the estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank Drumgoole, C. H. Venner Co., and Cidele Venner, are defendants, as the same appear of file and record in my office.

In witness whereof, I have hereunto set my hand and seal of said Court, at Springfield, in said District, this eighteenth day of June, in the year of our Lord one thousand nine hundred and nine.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

JAMES T. JONES, *Clerk.*

Endorsed on cover: File No. 21,734. S. Illinois C. C. U. S. Term No. 75. Allen A. Brown, Sabra Hodgkins, Mary A. Evans, et al., appellants, vs. The Alton Water Company. Filed June 24th, 1909. File No. 21,734.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1911.

**No. 75.**

ALLEN A. BROWN, SABRA HODGKINS, MARY A. EVANS, ROBERT E. WASON, ORRIN WARREN, WILLIAM B. TRASK, HARRIET N. HOUGHTON, CHARLES M. PAGE, JAMES SCHOULER, GEORGE W. FAIRBANKS, C. H. VENNER COMPANY, A CORPORATION, CIDELE VENNER, JAMES HAMILTON LEWIS AND ELIJAH N. ZOLINE.

*Appellants,*

*vs.*

THE ALTON WATER COMPANY,

*Appellee.*

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

## BRIEF AND ARGUMENT FOR APPELLANTS.

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,

*Attorneys for Appellants*

Geo. Hornstein Co., Printer, Chicago.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

**No. 75.**

ALLEN A. BROWN, SABRA HODGKINS, MARY A. EVANS, ROBERT E. WASON, ORRIN WARREN, WILLIAM B. TRASK, HARRIET N. HOUGHTON, CHARLES M. PAGE, JAMES SCHOULER, GEORGE W. FAIRBANKS, C. H. VENNER COMPANY, A CORPORATION, CIDELE VENNER, JAMES HAMILTON LEWIS AND ELIJAH N. ZOLINE.

*Appellants,*

*vs.*

THE ALTON WATER COMPANY,

*Appellee.*

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

## BRIEF AND ARGUMENT FOR APPELLANTS.

### STATEMENT.

*May it please the Court:*

In this case appellee, the Alton Water Company, a citizen of Illinois, by an original bill in equity, invoked the jurisdiction of the United States Circuit Court for the Southern District of Illinois against appellants and others, some of whom are citizens and residents of Illinois, and others who are citizens and residents of other states, and none of whom were at the time of filing the present suit residents of the Southern District of Illinois.

It is claimed by appellee that it is the successor in interest to certain property heretofore sold at a foreclosure sale under a decree of said Federal Court, and that this proceeding is ancillary to the former foreclosure proceedings; but appellants were not parties defendant to the foreclosure suit, had no notice of same, and they, therefore, contend that the present action as to them is an original and not an ancillary proceeding. The said foreclosure proceedings which resulted in a foreclosure sale, originated in the Circuit Court of Madison County, Illinois, and were, as appellants contend, improperly removed to said Federal Court, of which removal they had no notice, and, therefore, are not bound thereby. (This phase will hereinafter more fully appear at page 13-13 of this brief.)

The bill in the present action shows that on November 17, 1900, the Farmers' Loan & Trust Co. filed in said Madison County Circuit Court, its bill to foreclose a certain mortgage made by the Alton Water Works Co. upon the water plant situated in the City of Alton, Illinois. (That bill, for better certainty, is attached as an exhibit to the answer, Rec., 116.)

It appears that on January 1, 1887, the Alton Water Works Company executed a mortgage for $200,000 to the Farmers' Loan & Trust Company on its water plant and franchises in the City of Alton, Illinois. The mortgage contained the usual after acquired property clause. In 1893 the New England Water Works Company succeeded by purchase and conveyance to the property and rights

of the Alton Water Works Company, subject to the aforesaid mortgage.

By an ordinance passed by the Board of Trustees of the Village of *Upper* Alton, Illinois, in November, 1898, and amended December 27, 1898 (Rec., 147), the *Boston* Water & Light Company was granted the exclusive right and privilege to lay down, continue and maintain water pipes, etc., for the conveyance and distribution of water along certain streets and through public places in the Village of Upper Alton. Under this ordinance the Boston Water & Light Company proceeded to erect, and did erect, the water plant provided for in said ordinance, and for the purpose of raising the necessary funds to accomplish the object contemplated by said ordinance, it created an issue of 200 first mortgage bonds in the sum of $1,000 each, and secured the same by a deed of trust to the International Trust Company, Trustee, covering all its property and franchises in the Village of Upper Alton, and also the new pumping station and filter plant erected on its own land in the City of Alton.

Of the bonds so authorized and secured, $125,000 par value were issued and sold in the open market and the appellants, Robert B. Wason, Orin Warren, William B. Trask, Harriet N. Houghton, Charles M. Page, James Schouler and George W. Fairbank, and other parties, bought the same in good faith, and the water plant was duly installed, completed and paid for with the money realized out of the sale of these bonds, and from no other source. (See Answer, Sec. 17; Rec., 102, 103.)

In its said bill to foreclose the Farmers' Loan & Trust Company claimed equitable rights in the property of the Boston Water & Light Company by reason of the after acquired property clause of its said original mortgage, and it demanded that "any property taken from the property covered by the trust deed to your orator may be restored; that the equitable ownership of said new pumping works and additional water mains may be ascertained and decreed and the amounts due thereon and paid thereon, may be ascertained and provided for" (Rec., 142), but none of these prayers was granted, the decree of the court having gone outside of the issues formulated by said bill and subjected the entire property and franchise of the Boston Water & Light Company to the satisfaction of the said Farmers' Loan & Trust Company mortgage. (See Answer, Secs. 26, 27 and 28; Rec., 107, 108, 109 and 110.)

In the said foreclosure proceedings the said Farmers' Loan & Trust Company made the following parties defendant, viz.: The original mortgagor, the Alton Water Company; the New England Water Works Company, its successor by purchase; the Boston Water & Light Company, the owner of the water works system of the Village of Upper Alton, and the International Trust Company, Trustee, under the aforesaid trust deed, from the Boston Water & Light Company to said International Trust Company, but appellants, the bondholders under said trust deed, were not made parties defendant and had no notice of same. (See Answer, Sec. 4; Rec., 95.) Other parties who claimed liens upon the water plant in the City of Alton were made de-

fendants, one of whom, the United Water Works Company, was a citizen of New York and of the same state as the plaintiff in that cause, viz., the Farmers' Loan & Trust Co. (See Petition for Removal, Rec., 145, at bottom of page.)

By Section 24 of said deed of trust of the Boston Water and Light Company to the International Trust Company, the power and duty of the trustee is limited "to certifying the bonds as of the series mentioned herein," and "that the trustee *shall not in any event have any duty or responsibility* as to the *validity* hereof *or the security* hereby afforded." (See Answer, Sec. 23; Rec., 106; also trust deed, Sec. 24; Rec., 41), unless it, the trustee, is requested by a bondholder to foreclose the mortgage in case of default. It therefore had no power or authority to represent the bondholders in case like this, where the *very validity* of the title of the property secured by the trust deed was involved.

Upon said removal the cause proceeded to a decree in said United States Circuit Court, without appellants being brought into court, and by said decree the entire property and franchise of the Boston Water & Light Company, which was covered by the mortgage of that company to the International Trust Company, was subjected to the mortgage of the Alton Water Works Company to the Farmers' Loan and Trust Company, and ordered sold by the decree of sale. (See Bill, paragraphs "c," "d," "e" and "f"; Rec., 8-9.) From that decree of the Circuit Court an appeal was taken (by parties to the record and not by the present appellants) to the Circuit Court of Appeals for the Seventh Circuit, and the decree

was affirmed, under the title of *New England Water Works Co.* v. *Farmers' Loan and Trust Co.*, 136 Fed., 521.

Upon the affirmance of the said decree, about two years after the original decree was entered, a sale was made under said decree by a Master in Chancery on April 18, 1905, to Samuel Peck and others, and the United States Circuit Court for the Southern District of Illinois, on May 5, 1905, entered a decree confirming said sale and at the same time enjoined all parties to the suit and all persons claiming through or under them from ever asserting title to the same or disputing the title of the purchasers at said sale. Appellants-bondholders learned of this decree subsequent to the sale and filed objections to the confirmation of the sale, but their objections were stricken out by the court and held for naught. (See par. 3 of Answer; Rec., 94-95.) At this time, appellants endeavored to get an appeal allowed from the order confirming the sale, from his Honor, Mr. Justice Day (See "Statement" in *Lewis* v. *Peck*, 154 Fed., 273), but he denied the application on the theory that appellants were not parties to the suit, and that only parties are entitled to an appeal; that the remedy of appellants was by a direct proceeding. Thereupon some of the present appellants-bondholders, through one of their present counsel, James Hamilton Lewis, filed a suit in the Circuit Court of Madison County, Illinois, to foreclose the deed of trust of the Boston Water & Light Company to the International Trust Company upon their bonds, disregarding the foreclosure proceedings had in the Federal Court on the ground that said bond-

holders were not parties defendant thereto and that the International Trust Company, trustee under the provisions of the mortgage, had no power to represent them or bind them when the security or the title itself was attacked directly or collaterally by outsiders. Thereupon, upon application of Samuel Peck and others, who were the original purchasers at said foreclosure sale, a rule to show cause was issued against James Hamilton Lewis, as one of the counsel in the case, by the Circuit Court of the United States for the Southern District of Illinois, ruling him to show cause why he should not be punished for contempt of said United States Circuit Court for violating the injunctional decree aforesaid, restraining any attack upon the title of the purchasers. Thereupon, the respondent Lewis filed his answer denying the jurisdiction of the court and denying that the bondholders under the deed of trust of the International Trust Company were bound by the decree, but the said United States Circuit Court found the said Lewis guilty of contempt of court, and imposed upon him a sentence of imprisonment of sixty days in the county jail of Sangamon County, Illinois, and that the judgment of imprisonment shall be suspended if said Lewis will dismiss the said suit in the State Court within five days. Under duress said Lewis did dismiss the said suit, but at the same time prosecuted a writ of error from said contempt judgment to the Circuit Court of the United States for the Seventh Circuit, which court, by a majority of the members thereof (Judge Grosscup dissenting), held that the Circuit Court of the United States

for the Southern District of Illinois had no jurisdiction to enter said injunctional decree; that the same was not binding upon the bondholders, who were not parties to said proceedings, or upon their attorneys, and the judgment of said Circuit Court was accordingly reversed. This decision of the United States Circuit Court of Appeals is reported under the title of *Lewis* v. *Peck*, 154 Fed., 273, and for the convenience of the court is re-printed here as appendix "A" to this brief. After the decision in the *Lewis* case, a petition for *certiorari* was presented to this court by Samuel Peck, *et al.*, and was denied at the October Term, 1907, of this court. (Answer, par. 33; Rec., 112.)

The present so-called "ancillary bill" was filed by the Alton Water Company after the termination of the said contempt proceedings, it claiming to be the successor to Peck *et al.*, the original purchasers at said foreclosure sale, when the bondholders refiled their suit in said Madison County Circuit Court. The bill of the Alton Water Co., appellee herein, attempts to recite the history of the foreclosure suit brought by said Farmers' Loan and Trust Company, which lead to the foreclosure sale, and then complains that appellants, the bondholders under the trust deed of the Boston Water and Light Company to the said International Trust Company, brought suit in the Circuit Court of Madison County, Illinois, to foreclose the property secured by said trust deed for the non-payment of the bonds secured by said trust deed and brings to the attention of the court that in said suit it was made a party defendant. The specific prayer is that appellants and their attorneys be en-

joined from prosecuting said suit brought by them in the Circuit Court of Madison County, Illinois.

To this bill appellants interposed both general and special demurrers. The special causes of demurrer were as follows:

1. That it appears from the face of the bill that the Circuit Court had no jurisdiction over the subject matter and parties to the suit.

2. That said bill *is not an ancillary bill*, but is an *original* bill against appellants, it appearing from said bill that appellants were not parties to the proceedings referred to in said bill heretofore pending in said court. (See Demurrers, Rec., 67 to 78, inclusive.)

On November 27, 1907, a hearing was had in said United States Circuit Court upon said demurrers which were sustained by the court and the bill was "dismissed for want of jurisdiction." (Rec., 80.)

From this decree of the Circuit Court dismissing the bill "for want of jurisdiction," the Alton Water Company took an appeal to the United States Circuit Court of Appeals of the Seventh Circuit. (Rec., 81.) Upon the docketing of the cause in the Court of Appeals, appellants, who were the appellees in the Court of Appeals, filed a motion in that court to dismiss the appeal for want of jurisdiction, on the ground that the sole question involved and decided by the Circuit Court was the jurisdiction of the Circuit Court and that, therefore, the appeal should have been taken by the Alton Water Company directly to this court (see opinion of Court of Appeals, Appendix "B"); but the Court of Appeals overruled the motion upon the alleged ground that the

aforesaid demurrers did not challenge the jurisdiction of the court as a federal court, but only as a court of equity. It thereupon assumed jurisdiction of the appeal and held that the Circuit Court of the United States had jurisdiction and ordered the demurrers overruled. (The opinion of the Court of Appeals is reported in 166 Fed., 840, and is printed as Appendix "B" to this brief. See also order reversing. Rec., 88-89.)

Upon the filing of the mandate from the said Court of Appeals for the Seventh Circuit, the Circuit Court for the Southern District of Illinois, on the 18th day of January, 1909, entered an order overruling said demurrers and ruling appellants (the defendants below), to answer said bill by the 15th day of February, 1909. (Rec., 90.) The order also restrained appellants and their attorneys, in the meantime, from further proceeding in the said state court with said foreclosure suit in the state court until the further order of the court. (Rec., 90.)

Thereupon appellants filed their answer (Rec., 94), expressly denying the jurisdiction of the Circuit Court as a federal court and setting up that by the decree of the said United States Circuit Court in the said *Farmers' Loan and Trust Company* case (which is the basis of the present so-called ancillary bill), the property pledged as security for appellant's bonds by the said trust deed of the Boston Water and Light Company to the International Trust Company, trustee, was taken and sold, in proceedings to which they were not parties and of which they had no notice, and that, therefore, they were by

said foreclosure proceedings, deprived of their property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and in and by their said answer they expressly claimed the protection of said constitutional provisions (see Ans. p. 16; Rec., 102), and they further claimed that said decrees are void for want of jurisdiction over the subject-matter and parties. (See p. 4 and 5, of Answer; Rec., 95-96.) Appellants in their said answer further claimed that by the laws of Illinois (in the courts of which the original foreclosure proceedings were commenced and from whence the case was removed from the state to the federal court, and in which state the property pledged in said mortgage was located, appellants, as bondholders and equitable owners of the said water plant in and the franchise granted by the Village of Upper Alton, were necessary and indispensable parties; that said laws of Illinois as to procedure, constituted a rule of property binding upon the federal courts and constituted a contract between the parties. Appellants, as part of their defense, ask in their answer to be given the benefit and application of Section 10 of Article 1 of the Constitution of the United States. (See Sec. 15 of Answer; Rec., 99 to 102.) Appellants further, in their answer, claimed that the decree of sale as to the property in question was void for want of jurisdiction, because said sale of said property was made in excess of the issues, and said decree took said property without due process of law; that the United States Circuit Court had no jurisdiction of the subject-matter and parties because of the improper removal of the original fore-

closure suit from the state court to the United States Circuit Court. All of these matters will appear more fully in detail in argument under the different assignment of errors, and are referred to here merely to show the nature of the allegations and the successive steps in the case.

To this answer appellee filed exceptions on the ground of impertinence, but the exceptions were overruled by the court. (Rec., 158.) Appellees thereupon, by leave of court, filed an amendment and supplement to the bill, the substance of which was that since the filing of the so-called ancillary bill the suit brought by appellants in said Madison County Circuit Court, and which it sought to enjoin and prior to the issuance of the preliminary injunction in the case at bar, came up for final hearing in the said Madison County Circuit Court upon the plea of *res adjudicata* of said Alton Water Company (appellee); that same was sustained by said state court and that the bill of foreclosure was dismissed; that thereupon, appellants, the complainants in said state court, sued out a writ of error from the decree dismissing their bill to the Appellate Court, Fourth District of Illinois, but that they have not obtained any supersedeas thereon, said writ of error being stayed by the preliminary injunction heretofore granted in the case at bar by said federal court in the present proceeding. On motion of appellants, their answer heretofore filed was ordered to stand to the bill as amended. (Rec., 158.)

Thereupon, on motion of all parties who have appeared, the cause was *set down upon bill and answer.* (Rec., 158.)

Upon a final hearing upon said bill and answer on May 28, 1909, the court below held the answer insufficient to defeat the action of the complainant, and entered a decree making the temporary injunction heretofore issued permanent and directing that appellants (defendants below) do dismiss their writ of error sued out in the said Appellate Court for the Fourth District of Illinois, within thirty days from the entry of said decree. At the time of entry of said decree the United States Circuit Court for the Southern District of Illinois, *filed a certificate* with said decree (Rec., 162-163), certifying that the matter came up for hearing upon the bill and answer; that appellants by their answer and in oral argument challenged the jurisdiction of the court as a Federal court; that the court, after full consideration, denied their contentions and held that it had jurisdiction of the subject matter and parties; that "after hearing the arguments of counsel, held that the facts stated in the answer do not constitute a sufficient defense in law to the cause of action of the complainant, and that *no constitutional guarantees* or *privileges* of the defendants were violated by the entering of the decree set forth in the bill and answer, and *that the defendants were not deprived of their property without due process of law in violation of the Federal Constitution,* to which rulings and holdings of the court, the defendants (appellants here) then and there, by their counsel, duly excepted. (Rec., 163.)

Thereupon the defendants below, appellants here, in open court prayed for and were allowed an appeal directly to this court. (Rec., 172.)

## ERRORS RELIED UPON.

1. The Circuit Court of the United States for the Southern District of Illinois, had no jurisdiction to resume the hearing of this cause upon the mandate issued by the United States Circuit Court of Appeals for the Seventh Circuit, because said United States Circuit Court of Appeals itself had under the law no jurisdiction to review the record in this cause presenting the single question of the jurisdiction of the United States Circuit Court for the Southern District of Illinois, as a Federal court over the subject matter and the parties in the suit of *The Alton Water Company* v. *Allen A. Brown et al.*, as from said mandate and the record of this cause more fully appears, reference thereto being had. The judgment of reversal and remandment of the said United States Circuit Court of Appeals being void for want of jurisdiction, the decree of the Circuit Court for the Southern District of Illinois, dismissing the suit of the Alton Water Company for want of jurisdiction remains in full force and effect, and the United States Circuit Court for the Southern District of Illinois had no power thereafter to exercise any further jurisdiction over the subject-matter and the parties to this suit.

2. The Circuit Court of the United States erred in not holding that it had no jurisdiction as a Federal court over the subject-matter and the parties in this cause, upon the grounds set forth in the several answers of these defendants and appellants and in disregarding the objections made orally at the hear-

ing of this cause by counsel for these defendants (appellants) as to the jurisdiction of said court and in overruling each and every contention regarding such jurisdiction as set forth in the answers of these defendants, reference thereto being made.

3. The said Circuit Court erred in taking jurisdiction of this cause and in not holding that the bill of complaint herein falls within the inhibition contained in Section 720, Revised Statutes of the United States, expressly prohibiting the Federal courts from issuing injunctions to restrain proceedings in state courts.

4. The said Circuit Court erred in holding that the bill of the Alton Water Company, in this cause against the defendants and appellants is an ancillary bill instead of an original bill.

5. That the said Circuit Court erred in refusing to hold that it had no jurisdiction to hear and determine the original suit of the *Farmers' Loan & Trust Company* v. *The New England Water Works Company, The Alton Water Works Company, The American Loan and Trust Company, trustee, and the United Water Works Company et al.*, as is more fully set forth in the bill and answer in this cause on the ground that said cause was illegally and improperly removed from the Madison County Circuit Court to the said United States Circuit Court for the Southern District of Illinois, said cause not being a removable cause within the meaning of the law in such cases made and provided, and not having been removed until after answer was filed by the removing defendant.

6. The court erred in not holding that the decrees entered by the Circuit Court of the United States for the Southern District of Illinois on December 23, 1903, and the decree of the same court entered on May 5, 1905, in the said suit of the Farmers' Loan and Trust Company against the New England Water Works Company, The Alton Water Works, The American Loan and Trust Company, trustee, the United Water Works Company, Ltd., The Boston Water and Light Company, and The International Trust company *et al.*, as set forth in the bill of complaint and answer herein and illegally and improperly removed into said court from the Madison County Circuit Court of Illinois, are void and are inoperative as against the rights of these defendants, because they were not made parties to said suit and were not brought into court in any manner as required by the Constitution and laws of the State of Illinois and by the law of the land, and had no notice whatever of the hearing thereof or of the pendency of said suit, as more fully appears in the answers of these defendants on file in this cause, reference thereto being had; and that, therefore, these defendants and appellants were deprived of their property by the said decrees without due process of law in violation of the fifth and the fourteenth amendments of the Constitution of the United States of America, said constitutional privileges having been fully claimed and set up in said answers filed by these defendants in said cause, reference thereto being had.

7. The said Circuit Court of the United States erred in not holding that these appellants were

necessary and indispensable parties to the foreclosure in the said suit of the *Farmers' Loan and Trust Company* v. *The New England Water Works Company et al.*, and that the constitutional enactments and statutes of the State of Illinois and the decisions of the Supreme Court of Illinois are a part and parcel of the trust deed of the Boston Water and Light Company to the International Trust Company, trustee, and constitute a contract within the meaning of Section Ten of Article One of the Constitution of the United States of America, which the courts of the United States are bound to respect and enforce; and that by reason of the said law of Illinois these defendants and appellants were entitled to have notice of the said foreclosure proceedings to protect their property and to be heard upon their contentions in this behalf; and that the failure to make these defendants and appellants parties defendant to said cause operated to deprive these defendants and appellants of their property without due process of law, contrary to the Constitution of the United States of America and the amendments thereto.

8. The court erred in not holding that the said decrees are void, because they were made and entered wholly outside and in excess of the issues made and presented in said cause between the parties litigant, to-wit: The Farmers' Loan and Trust Company, the Boston Water and Light Company and The International Trust Company, trustee, as set forth in the twenty-sixth, twenty-seventh and twenty-eighth paragraphs of the answer of these defendants, reference thereto being had, and be-

cause said Circuit Court adjudicated conflicting and adverse rights of the claims to title between the Farmers' Loan and Trust Company, The Boston Water and Light Company and The International Trust Company, trustee, whereas said bill of the said Farmers' Loan and Trust Company was in substance merely a bill for foreclosure and accounting and had no allegations appropriate to justify the entering of the decree of sale in the manner and form as was entered in said cause; that therefore said decree of sale and the order confirming said sale took the property of these defendants and appellants which was never acquired, owned or mortgaged by The Alton Water Works Company without due process of law and in violation of the fifth and fourteenth amendments to the Constitution of the United States of America.

9. The Circuit Court erred in not holding that under the admitted facts as set forth in the answer it is inequitable to enforce against these defendants the said decrees entered in said Circuit Court of December 23, 1903, and May 5, 1905, the equities being entirely with these defendants.

10. The said Circuit Court erred in holding and deciding that the facts stated in the several answers filed by these defendants in this cause were not sufficient to constitute a defense to the cause of action in the complaint of the said The Alton Water Company, complainant herein.

11. The said Circuit Court erred in not granting to these defendants the constitutional privileges

claimed by these defendants in the answers filed in this cause.

12. The said Circuit Court erred in entering the decree in this cause and in enjoining these defendants in the manner and form as set forth in the decree now appealed from and in entering judgment for costs against these defendants, and in granting the relief prayed for in the bill of complaint herein.

**13. That the final decree entered in the above entitled cause deprives these defendants and appellants of their property without due process of law in violation of the fifth and fourteenth amendments to the Constitution of the United States of America, and makes it impossible for them by any legal process to secure their rights in any court of law or equity in the land.**

## BRIEF OF ARGUMENT.

**The Circuit Court of the United States for the Southern District of Illinois has and had no jurisdiction to resume the hearing of this cause upon the mandate issued by the United States Circuit Court of Appeals for the Seventh Circuit, because said United States Circuit Court of Appeals itself had under the law no jurisdiction to review the record in this cause presenting the single question of the jurisdiction of the United States Circuit Court for the Southern District of Illinois as a Federal court over the subject matter and the parties in the suit of The Alton Water Company v. Allen A. Brown et al., as from said mandate and the record of this cause more fully appears, reference thereto being had. The judgment of reversal and remandment of the said United States Circuit Court of Appeals being void for want of jurisdiction, the decree of the Circuit Court dismissing the suit of The Alton Water Company for want of jurisdiction remains in full force and effect, and the United States Circuit Court for the Southern District of Illinois had no power thereafter to exercise any further jurisdiction over the subject matter and the parties to this suit. (Assignment of Error No. 1; Rec., 165.)**

At the threshold of this case the first inquiry should be, Did the court below re-acquire jurisdiction to proceed with the cause upon the mandate from the Circuit Court of Appeals, for if it be true

that the appeal from the decree in this cause of the said Circuit Court of the United States, dismissing same 'for want of jurisdiction,' should have been taken directly to this court, it would require little argument for the proposition that the Circuit Court of Appeals was without jurisdiction to hear and entertain said appeal, and that its mandate was without force and wholly void.

Where the issue is one of want of jurisdiction on the part of the court and this question is determined in the negative, the only question that remains subject of an appeal is the single and sole one, Had the United States Court jurisdiction to hear and determine the matter?

Appeal upon this question is limited by the specific act creating the Circuit Courts of Appeal, to the Supreme Court of the United States, the language of the statute being:

> "Appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:
>
> "First, in any case in which the jurisdiction of the court is in issue." * * *

(Sec. 5, Act of March 3, 1891, Chap. 517; 26 Stat., 827, as amended by 29 Stat., 492; U. S. Compiled Stat., 1901 p. 549.)

The whole question in our judgment is controlled by the case of *U. S.* v. *Jahn*, 155 U. S., 109, where it was held that in cases in which the jurisdiction of the court below was at issue *and the decision is upon that point*, the appeal *must* be taken directly to this court.

In *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S., 282-295, a bill was filed in the Circuit Court of the United States on the theory of an infringement of a patent, to which an answer was filed denying the jurisdiction of the court. Upon argument, which was upon the question of jurisdiction alone, the court held that the suit was not one arising under the patent laws of the United States, but solely out of a contract; that the court had no jurisdiction and entered a decree to that effect. The decree had the following recital: "It is, therefore, ordered and decreed that said suit be dismissed for want of jurisdiction"; whereupon complainant took an appeal to the Circuit Court of Appeals, which dismissed the case upon the ground that it had no jurisdiction itself over the appeal, and that as such an appeal was prosecuted from an order dismissing the bill solely for want of jurisdiction it should have been taken to the Supreme Court of United States, 48 C. C. A., 349; 109 Fed., 497. Whereupon the mandate of the Circuit Court of Appeals being filed in the Circuit Court, an appeal from the final decree of that court was taken to this court, which took jurisdiction of the appeal without a certificate holding that the order allowing the appeal "from the final order" dismissing said suit for want of jurisdiction was a sufficient certificate.

The jurisdiction of the Circuit Court of the United States in the case at bar was questioned in several ways (Rec., 66):

1. By general demurrer.
2. By special demurrer.

The grounds of the special demurrer were:

(a) That the court had no jurisdiction *of the subject matter* and *parties.*

(b) *That the bill was not an ancillary but an original bill.*

That the jurisdiction of the court as a Federal court was challenged by the demurrer is clear from the second specification, for unless the bill can be said to be ancillary, it is manifest that the Circuit Court of the United States would have no jurisdiction over the subject matter and parties as a Federal court, it appearing on the face of the bill that the cause of action is not founded upon the Constitution or laws of the United States, and that none of the parties defendant were, at the time of filing suit, residents of the Southern District of Illinois; that the complainant and some of the defendants are citizens of Illinois while the other defendants were citizens and residents of other states.

Service in the so-called ancillary proceeding upon the various defendants was obtained upon them in different states and in different districts upon process issued by the Circuit Court of the Southern District of Illinois. (See order for service, Rec., 47-49.)

Process was issued in this case beyond the territorial jurisdiction of the Southern District of Illinois. (Rec., 52, *et seq.*) Such process cannot reach a party beyond the territorial jurisdiction of the court.

*Kendall* v. *U. S.*, 12 Pet., 524.
*Ableman* v. *Booth,* 21 How., 506.
*Pennoyer* v. *Neff,* 95 U. S., 714.

No judgment can be rendered by a court of the United States against a defendant who is not an

inhabitant of the district where the court is sitting, unless process has been served upon his person within that district, or unless he waive the necessity of process by entering his appearance in the suit.

*Hollingsworth* v. *Adams*, 2 Dall., 396.
*Tolland* v. *Sprague*, 12 Pet., 300.
*Levy* v. *Fitzpatrick*, 15 Pet., 167.
*Herndon* v. *Ridgeway*, 17 How., 424.
*Chaffee* v. *Hayward*, 20 How., 208.

Hence the defendants below, by their special demurrer, claimed that they were improperly brought into court and that the court below had no jurisdiction over their persons, as well as over the subject-matter. All of this was necessarily brought to the attention of the trial court upon the argument of the demurrers and their contentions were upheld by the court, and the demurrers were ordered sustained and the bill dismissed *for want of jurisdiction* at the cost of complainant. (Rec., 80.)

The Circuit Court of Appeals was therefore in error in holding that the demurrers in this case did not challenge the jurisdiction of the court as a Federal court.

And again the first specification of the special demurrer is that the court had no jurisdiction of the subject-matter and parties. That such an assignment went directly to the *power* of the court as a Federal court to hear and determine the matter we respectfully refer to the following passage from the well known American work of "Brown on Jurisdiction," Sec. 1*a*, p. 4:

"Jurisdiction over the *subject-matter* is the right of the court to exercise judicial power over that class of cases; *not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending;* and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending because of some inherent facts which exist and may be developed during the trial."

This definition given by Mr. Brown, finds support in the following well considered cases:

*Hughes* v. *Cuming*, 165 N. Y., 91.
*Cooper* v. *Reynolds*, 77 U. S., 308, 316.

The jurisdiction or the right of the Circuit Court of the United States to try the case at all, or in other words, the abstract power of the court was denied and questioned by the special demurrers.

The jurisdiction of a court can never depend upon its decision upon the merits of the case brought before it, but its right to hear and decide it at all.

*Ex parte Watkins*, 7 Pet., 568.

**But it is immaterial how the point was raised.**

In *Wetmore* v. *Reymer*, 169 U. S., 120, the court says:

"But under the Act of 1875, the trial court is not bound by the pleadings of the parties, but may of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist." (Citing *Williams* v. *Nottawa*, 104 U. S., 209; *Barry* v. *Edmunds*, 116 U. S., 550; *Morris* v. *Gilmer*, 129 U. S., 315; *Deputron* v. *Young*, 134 U. S., 241.)

"And our present problem is to preserve as

well the power of the local court to make such inquiries as the right of suitors, so expressly reserved to them in the statutes, to have the action of the lower court reviewed by the Supreme Court of the United States."

And again:

> *"The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined."*

It is respectfully submitted that whether the bill was ancillary or original; whether the defendants were properly brought into court; whether the court had jurisdiction over the subject-matter and parties and whether the Circuit Court correctly held the law applicable to these questions was, of course, not for the Circuit Court of Appeals to determine, but for this court, where the appeal should have been taken in the first instance.

*Globe Newspaper Co.* v. *Walker,* 210 U. S., 356, is somewhat a parallel case upon some phases of the present record. In that case the Circuit Court held, on demurrer, that the declaration did not present a cause under the copyright laws of the United States. The demurrer was sustained and suit dismissed. The plaintiff then took an appeal to the Circuit Court of Appeals, which court, as in the case at bar, held the declaration good, and ordered the demurrer overruled. Upon the re-docketing of the cause in the Circuit Court, the defendant newspaper company, in various forms, objected to the jurisdiction of the court as a court of the United States. Its

objection to the jurisdiction was overruled. The point was then made that the action of the Circuit Court was controlled by the mandate and opinion of the Court of Appeals, and therefore not reviewable by this court. Upon this proposition this court, speaking through Mr. Justice Day, says:

> "A preliminary objection is made that this court cannot entertain jurisdiction of this writ of error, because the case is not one which may properly come here under Sec. 5 of the Court of Appeals Act of 1891 (26 Stat. at L. 827, Chap. 517; U. S. Comp. Stat. 1901, p. 549); and it is contended that, as the case went to the Circuit Court of Appeals, and that court determined it, if the present plaintiff in error wished to save the question of jurisdiction, it should have been duly certified to this court from the Court of Appeals. But we are of the opinion that this objection is untenable. The case was taken to the Circuit Court of Appeals by Walker & Company. The judgment of the Circuit Court was in favor of the newspaper company. It had no occasion to take the case to the Court of Appeals. When the Court of Appeals reversed the decision of the Circuit Court and remanded the case for trial, because of its holding that the declaration contained a cause of action in favor of Walker & Company, the Circuit Court was bound by, and of course followed, the decision of the Circuit Court of Appeals.
>
> "The newspaper company, in various forms, objected to the jurisdiction of the court as a court of the United States, because there was no such action under the copyright law as was asserted in the declaration filed against it. Its objection to the jurisdiction was overruled. It saved the question in various ways and brought it here upon an adequate certificate, raising solely the question of jurisdiction. We think we have jurisdiction of the case."

Appellants here are in the same situation. They had no occasion to go to this court when their demurrer to the jurisdiction of the court was sustained. They have, after the case was remanded and re-docketed in the Circuit Court, by the answer and in oral argument, challenged the jurisdiction of the court as a court of the United States, and are now in this court upon a proper certificate *and because of the reliance of appellants in the answer upon the guarantees and privileges of the Federal Constitution.*

> *Loeb* v. *Columbia Township Trustees,* 179 U. S., 473, approving *Holder* v. *Aultman,* 169 U. S., 81; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S., 89.

In a case before the Supreme Court of the United States on the ground that a constitutional question is involved that court has jurisdiction of the entire case and of all questions involved in it.

> *Fields* v. *Barber Asphalt Co.,* 194 U. S., 621, and cases cited.

That includes the question of jurisdiction.

> *Scott* v. *Donald,* 165 U. S., 58.

Among the assignments of error in the case at bar appellants by assignment of error No. 13 (Rec., 168), complain that by the judgment of the Circuit Court of the United States in the case at bar they were and are deprived of their property without due process of law in violation of the fifth amendment to the Constitution of the United States.

Under a similar assignment of errors the jurisdiction of this court on appeal was sustained in

*Fayerweather* v. *Ritch*, 195 U. S., 276-309.

**The said Circuit Court erred in holding that the bill of The Alton Water Company in this cause against the defendants and appellants is an ancillary bill instead of an original. (Assignment of Error No. 4; Rec., 166.)**

**The Circuit Court of the United States erred in not holding that it had no jurisdiction as a Federal court over the subject matter and the parties in this cause upon the grounds set forth in the several answers of these defendants and appellants and in disregarding the objections made orally at the hearing of this cause by counsel for these defendants as to the jurisdiction of said court in overruling each and every contention regarding such jurisdiction as set forth in the answers of these defendants, reference thereto being made. (Assignment of Error No. 2; Rec., 165-6.)**

**The said Circuit Court erred in not granting to these defendants the constitutional privileges claimed by these defendants in the answers filed in this cause. (Assignment of Error No. 11; Rec., 167.)**

These assignments of error, by reason of the close connection of topics discussed, will be treated together.

## I.

It cannot be contended that the presence of The International Trust Company, trustee, in the fore-

closure suit of the Farmers' Loan and Trust Company, could bind appellant-bondholders personally. This was directly adjudged in *Lewis* v. *Peck* (contempt case), 154 Fed., 273, but it is said that the decree entered in that court was a decree *in rem.*

In discussing the effect of a decree of a Federal court in a proceeding *in rem,* Mr. Justice Miller, in the case of *Cooper* v. *Reynolds,* 10 Wall., 308, says:

> "No suit can be maintained on such a judgment in the same court or any other."
>
> See also *Freeman* v. *Alderson,* 119 U. S., 189.

Therefore, we respectfully submit that no new suit can be predicated upon said decree, and that the present suit is not maintainable as against appellants who were not parties to those proceedings and of whom the court never had jurisdiction.

## II.

### The Bill Is Not an Ancillary Bill, but an Original Bill.

The bill is an original bill as to the bondholders, defendants below, who were not parties in the original foreclosure suit.

> *Williams* v. *Byrne,* 29 Fed. Cases, 1361.
> *Dunn* v. *Clarke,* 8 Peters, 3.
> *Christmas* v. *Russell,* 14 Wall., 80.

**In order to maintain an ancillary bill, the parties and subject-matter must be the same.**

*Root* v. *Woolworth*, 150 U. S., 401.

*Riverdale Mills* v. *Manufacturing Co.*, 198 U. S., 188.

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees and judgments which remain unreversed, *when the subject-matter and the parties are the same in both proceedings.*"

*Root* v. *Woolworth*, 150 U. S., 411.

If other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill, and consequently the jurisdiction of the Circuit Court must depend upon the citizenship of the parties.

*Dunn* v. *Clarke*, 8 Peters, 3.

Where there is no change of parties in a suit, during its progress, the jurisdiction of the court which depended on the condition of the parties is governed by the condition existing at the time of the commencement of the suit.

*Conolly* v. *Taylor*, 2 Peters, 556; 7 L., 518; 11 U. S. Notes, 874.

A party who has an interest in the property and was not made a party to a foreclosure suit need not file a bill for review. As to such a party the "decree is just the same as if no such decree has even been made."

*Noys* v. *Hall*, 97 U. S., 34.

## III.

### Pertinent Distinction.

(a) This case must be distinguished from an ordinary foreclosure case with the trustee being party plaintiff or defendant. Here the property of appellant-bondholders not covered by the original mortgage and to which they were not parties, was sought to be reached. It was not a case growing out of the trust itself like the default of payment of interest or some other breach of the covenants of the trust deed, but on the contrary, the Farmers' Loan and Trust Company asked to subject the property of a different corporation operating under a separate franchise, and equitably belonging to appellant-bondholders, to be turned over to it as a party *claiming title adversely* to said International Trust Company, trustee, nor was this a case where a subsequent mortgagee on the same property was made a party defendant. The property covered by the International Trust Company mortgage covered different property and was acquired by the Boston Water and Light Company eleven years after the execution of the Farmers' mortgage and five years after the Alton Water Works Company conveyed all of its property to the New England Water Works Company.

The International Trust Company, trustee, in such a case had no authority or power to represent the appellant-bondholders on general principles of law and equity and particularly because the trust deed itself did not authorize it to defend a suit *where*

*the security itself or the title* to the property is attacked or involved. Its presence in court was that of a nominal party, the real parties in interest being the bondholders themselves.

The said trust deed of the Boston Water and Light Company to the International Trust Company expressly withheld from the said trustee any *power* or *duty* to represent the bondholders in a case like this. Sec. 24 (Rec., 106; see Answer, Par. 23) of said trust deed provides:

> "The trustee hereunder shall not in any event *have any duty or responsibility as to the validity hereof or the security hereby afforded*, nor as to the execution, acknowledgment, recording or renewal hereof, nor (*unless said trustee is called upon to take active measures to enforce the security by foreclosure or otherwise, with due indemnity*) taxes or repairs, or any other matters affecting the security; and in *general* it is understood that prior to being called upon their *sole duty is confined to certifying bonds* as of the series mentioned herein."

In construing that particular clause of the trust deed we believe that the word "duty" implies power and when it is said that a trustee shall have no duty, it means that it shall have no power or authority. And in connection with this the court will observe this language of the trust deed "and in general it is understood that prior to being called upon their *sole* duty is confined to certifying bonds as of the series mentioned herein."

One's "duty" is what one is bound or under obligation to do.

*Crockett* v. *Village of Barre,* 66 Vt., 269; 29 Atl., 1471, citing:

Soule Syn., p. 129.
*Harrison* v. *Bush,* 5 El. & Bl., 344.
*Sharon* v. *Sharon,* 16 Pac., 345; 75 Cal., 1.

"What is a man's duty to do, he has the rightful power to do. And the converse of this proposition must be true."

*Commonwealth* v. *Athens,* 5 Gray, 185, 252.

Duties imply "powers and duties."

*Chadwick* v. *Earhart,* 4 Pac., 1180; 11 Ore., 389.

"Power" and "duty" are synonymous terms. When a man has no duty to perform he has no power to do it.

*Commonwealth* v. *Athens,* 71 Mass. (5 Gray) 185, 252.

The word "duties" necessarily implies powers and in legal effect is equivalent to "powers and duties."

*Chadwick* v. *Earhart,* 4 Pac., 1180; 11 Ore., 389.

Worcester, among other definitions, defines "duty" as follows: "Any service, business, or office." A like definition is given in the Imperial Dictionary. When we speak of "duty" as applied to a servant or employe, the matter involves his service or business. We intend to refer to what he does in his service or business. When we ask a

servant what his general duties are, we intend to ask him what service or work he generally performs.

*Missouri Pac. Ry. Co.* v. *Mackey,* 6 Pac., 291; 33 Kans., 298.

The word "responsibility" is synonymous with duty.

*Village of Barre,* 29 Atl., 147; 66 Vt., 269.

We must strenuously insist that the words "the trustee hereunder shall not in any event have any duty or responsibility as to the validity hereof or the security hereby afforded," was meant to cover just such a case as this, viz: *the attack upon the title by a stranger.*

(b) The rule as to parties in cases like this, as stated in Perry on Trusts, Vol. 2, Sec. 883, is as follows:

> "If a *cestui que trust* is absent and all the means of compelling him to appear have been exhausted, the suit may proceed in his absence. So if he is a merely passive party, and the disposition of the property is within the power of those before the court. *But if the primary object of the bill is to affect the right of the absent cestui que trust, or to charge it with debts or liens, the court will not make a decree in his absence,* although the *legal* title is in the parties before the court. In such cases decrees have been made reserving the rights of the *cestui que trust* to apply to have it amended or conveyances have been ordered without prejudice to the rights of the *cestui que trust,* who could not be found."

Story's Eq. Pleading (10th Ed.) lays down the rule in the following sections of his work:

"Sec. 149. So, persons having demands prior to the creation of a trust may enforce these demands against the trustees, without bringing before the court the persons interested under the trust, *if the absolute disposition of the property is vested in the trustees.* But if the trustees have no such power of disposition (as in the case of trustees to convey to certain uses), the persons claiming the benefit of the trust must be made parties. In many other cases, persons having specific charges on trust property, are also necessary parties. Thus for example, if an indenture of assignment should be made by a debtor, conveying all of his property to such of his creditors as should execute the indenture within three months and twenty only of his creditors within the period execute the indenture; and a suit should be brought by a judgment creditor to recover satisfaction out of the trust property upon the ground of the priority of his judgment, all the creditors who had signed the instrument, their names being known, ought to be made parties; and an allegation in the bill of their being numerous would not be sufficient." * * *

"Sec. 207. In cases of trust, the general rule in cases of this sort is that in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust* (or beneficiaries), as well as the trustees are necessary parties. And where the suit is by or against the *cestuis que trust* (or beneficiaries) the trustees also are necessary parties. The trustees have the legal interest, and therefore they are necessary parties. The *cestuis que trust* (or beneficiaries) have the equitable and ultimate interest to be affected by the decree and, therefore, they are necessary parties. Indeed, in England, the general rule is that, if property is given to trustees for certain *cestuis que trust* (or beneficiaries) a court of equity will decree

it to be paid to the latter and not to the trustees; so that the beneficiaries are emphatically the direct parties in interest. For a similar reason, all persons who have specific charges on trust property, derived under the trust, and appertaining to the due execution of it, are generally required to be made parties to suits respecting the due execution of the trust, or touching their rights therein, whenever the persons are definitely ascertained and the trust is of a limited nature."

"Sec. 208. Upon the general principles of courts of equity, there would be an impropriety in binding either the legal claimants, or the equitable claimants, unless they were fully represented, and permitted to assert their rights before the court; *and if not bound the decree would not be final on the matter litigated.* If the *cestuis que trust* (or beneficiaries) should not be made parties to the suit, and their interests are apparent, a court of equity will sometimes, as a matter of indulgence, and to prevent further delay and expense, allow them (if they wish) to bring forward their claims by petition, in order to have their interests ascertained, and their rights protected. *But at all events, they may bring a bill against their trustees and the original plaintiff, to assert and protect their rights in the other suit.*"

And again, in Section 215:

"Persons who have demands upon trust property prior to the creation of the trust, may enforce those demands against the trustees, without making the persons interested in the trust parties to the suit, if the absolute disposition of the property is vested in the trustees. *But if the trustees have no such absolute power of disposition* (as if they are trustees merely to convey to uses) then, and in that case, the persons

> entitled to the benefit of the trust must also be made parties. * * * And where the purpose of the bill is to declare trusts for the benefit of those not named as beneficiaries in the writing, the latter must be joined."

(These authorities are quoted and approved in *Bockfinger* v. *Foster,* 10 Okl. Terr., 488; 62 Pac., 799; affirmed in 190 U. S., 116, but this point is not treated in opinion. In the *Bockfinger* case the 9th Ed. of Story is quoted from.)

At p. 495 of the opinion of the Supreme Court of Oklahoma, speaking of the necessity of bringing in the *cestui que trust,* makes the following observation:

> "If this is not to be the rule, *then one can be deprived of property without due process of law,* for surely it will not be contended that an equitable interest of a beneficiary under a trust deed is not property as contemplated by the Constitution."

In *Veteran* v. *Barnes,* 124 U. S., 171, the court said:

> "The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties, so that the court may 'finally determine the entire controversy, and do complete justice by adjudging all the rights involved in it.' *Story* v. *Livingston,* 13 Pet., 359, 375; *Shields* v. *Barrow,* 17 How., 130, 139. But in a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, *if the trustee has such powers or is under such obligations, with respect to the execution of the trust, that 'those for whom he holds will be bound by what is done against him, as well as by what is done by him.'* In such cases or representa-

tion by trustees, the beneficiaries will be bound by the judgment, 'unless it is impeached for fraud or collusion between him and the adverse party.' *Kerrison* v. *Stewart*, 93 U. S., 155, 160."

In *Kerrison* v. *Stewart et al.*, 93 U. S., 155, cited in above opinion, the court say:

"It cannot be doubted that under some circumstances a trustee may represent his beneficiaries. * * *

*"The difficulty lies in ascertaining whether he occupies such a position, not determining its effect if he does."*

(c) It will be observed that the International Trust Company was a nominal trustee merely to secure the debt. It was not given and *it did not have possession* nor the *active management* of the property.

In *McGraw* v. *Bayard*, 96 Ill., 146, the Supreme Court of Illinois points out the distinction. We quote from p. 153 of the opinion:

"The general equity rule is, that all persons interested in the subject matter of a suit must be made parties in order that the decree may affect their rights, and this rule requires that in litigation had in respect to trust property, both the trustee and the *cestui que trust* be made parties. There is an exception to this where the trust is an *active* one, imposing on the trustee the duty of receiving, controlling and managing the trust fund for the benefit of the *cestui que trust*. Such is the case of *Willis* v. *Henderson*, 4 Scam., 18. *But where a trustee is interposed between a lender and a borrower, merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred upon him by a mortgage or a deed*

*of trust, and the trustee can only be called upon to act in case of default of the grantor in performing the conditions of the instrument, both trustee and cestui que trust must be made parties."*

And in *Bayard* v. *McGraw* (the same case), 1 Ill. App., 134, the Appellate Court of Illinois said (p. 143):

"The deeds showed that Smith had but the *naked legal title*, with no beneficial interest in the property or in the debt secured by it, and *was without power* to act in the premises *except upon a contingency which at the* time of filing this petition had not happened, to-wit: the *default* of *Hayes;* and then, merely to sell and pay over the proceeds to his *cestui que trust,* the party really interested. * * * And it seems to be settled that he is not his representative in such a sense as that a decree against him, affecting the property, will bind the *cestui que trust."*

A case exactly in point and similar to the case at bar was decided by the Supreme Court of Pennsylvania *In re Appeal of Harrisburg & Eastern Railroad Company*, 15 Atl. Rep., 459. The court, per Green, J., says:

"The proceeding is aimed directly against the bonds in question and of course assails, necessarily, the rights of the persons who hold them. * * * The right of the latter (the bondholders) to own the bonds, and to defend the validity of the bonds, is a right which is personal to the owners of the bonds. Whenever that right is assailed, they have an undoubted right to protect themselves and their title in their own persons and by their own counsel. It may be conceded that for many pur-

poses the trustees do represent the bondholders, and whenever they do (that is, whenever they can, under the deed) the latter are bound by their acts.

"The authorities cited for the appellant do not reach to the position that in a proceeding such as this which attacks the very validity of the bonds, the trustees may be substituted as defendants, and process served on them so as to obligate the bondholders by all the consequences of an adverse proceeding and judgment."

In the case of *Sears* v. *Hardy*, 120 Mass., 529, the court say:

"Generally speaking, however, to a suit against trustees to enforce the execution of a trust, *cestuis que trust*, claiming present interests directly *opposed to those of the plaintiff, should be made parties, in order that they may have the opportunity themselves to defend their rights, and not be obliged to rely upon the defense made by the trustees, or to resort to subsequent suit against the trustees or the plaintiff, or to take the risk of being bound by a decree rendered in their absence.*" (Court cites the following authorities: Story Eq. Pl., Secs. 72, 76c, 180, 192, 193, 201, 207, 208; *Hopkins* v. *Hopkins*, West Ch., 606, 619; s. c., 1 Atk., 581, 590; *Holland* v. *Baker*, 3 Hare, 68, 72; *Coles* v. *Forrest*, 10 Beav., 552, 557; *Caldwell* v. *Taggart*, 4 Pet., 190, 203; *Clark* v. *Reyburn*, 8 Wall., 318; *Michigan State Bank* v. *Gardner*, 3 Gray, 305, 308.)

In *Holland* v. *Baker*, 3 Hare's Chan., 72, the Vice Chancellor says:

"Trustees are not themselves owners in executing the trusts, but *they are not constituted agents for the purpose of defending the own-*

*ers against the adverse claims of third parties in this court.* It is the duty of trustees in such a situation to object that the owners of the estate are not before the court; and I think it is the right of trustees in that case to insist that the onus of resisting adverse claims shall be thrown upon the *cestui que trusts*, and not on themselves."

The reason for it is that there is no privity of interest between the trustee and the bondholder. This distinction pointed out has been well illustrated in *Commissioners* v. *Thayer*, 94 U. S., 634, the court, at page 644, say:

"The question then arises, whether notice to one of the trustees in this deed of trust is notice to the holders of the mortgage bonds in such manner that, in a suit by the trustees to enforce payment of the county bonds, the character of a *bona fide* holder, without notice is lost. In *Curtis and others* v. *Leavitt*, 15 N. Y., 194, the court said:

" 'If Graham, one of the trustees, was chargeable, as director of the company, with knowledge that there had been no previous resolution, notice to him was not notice to his *cestuis que trust.* He did not stand to them in the relation of an agent. He was selected and appointed as a trustee by the company, not by the *cestuis que trust.* His powers and duties were prescribed by the company, not by the bondholders. There were at the time of the execution of the trust deeds, no bondholders, no *cestuis que trust.* It is a necessary attribute of an agency that it should be created by the principal. * * * In this case, as the relation of principal and agent did not exist between the bondholders and Graham, notice to him, or knowledge by him, that there was no previous resolution was not constructive notice to the bondholders.'

"And, again, on the page following, it is said: 'The trustees are not to be regarded as the agents of the purchasers of the bonds and mortgages assigned to them. No consideration proceeds from them. They were mere assignees of those securities, coupled with no interest, in trust to hold them as security for the payment of all the mortgage bonds that should thereafter be sold or negotiated by the company. * * * Whoever purchased the mortgage bonds became purchasers of the bonds and mortgages so assigned as security for their payment, or of an equitable right to hold them as such security.'

"We thing this is sound doctrine, and that it establishes the proposition that notice to Thayer did operate to destroy the *bona fide* holding of the bondholders under the deed of trust in which he was named as one of the trustees."

In the case of *Chambers* v. *Previtt*, 172 Ill., 624, the court said:

"It is further contended that the decree on the cross-bill in the *Wilson* case is *res judicata* against appellees, Prewitt, Johnson and Warren, though they were not parties to the suit, because they claim under and through James D. and Lloyd B. Smith, who were. But they do not so claim. *The relation they sustain to them is not that of privies in estate, but of cestuis que trust.* Their right is derived directly from the mortgage, and the trustees were powerless, by any act or default of their own, to release or prejudice it."

See, also, *Nevitt* v. *Woodburn*, 190 Ill., 283.

(d) Equity Rule 48 of the U. S. Supreme Court is as follows:

"Where the parties on either side are very numerous, and cannot, without manifest incon-

> venience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

Appellants, the bondholders of the Boston Water & Light Company, and not the trustee named in the mortgage, at the selection of the Water & Light Company, were the only parties having any substantial interest, and who would suffer any loss as the result of an erroneous and void decree embracing their property.

**No one representing the bondholders as a class was made a party defendant to represent their interest, except the trustee who was not authorized to represent them and by whose representation, we contend, they were not bound.**

In *Minnesota* v. *Northern Securities Co.*, 184 U. S., 199, this court held that the real parties in interest must be brought in as parties defendant in a suit in equity, and that while under an act of Congress it is sometimes possible to dispense with parties so as to prevent an ouster of jurisdiction, and that while rule 47 of this court sometimes removed the difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence of natural justice that all indispensable parties must be brought in. "And the forty-seventh rule is only

a declaration, for the government of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of this court, on the subject of that rule."

The record in the original foreclosure case fails to show that there was a showing made that the parties defendant were too numerous, so that they could not be brought into court "without manifest inconvenience nor oppressive delays" as provided for by said rule.

In *Lebeck* v. *Fort Payne Bank,* 115 Ala., 447, where the bonds were numbered from 1 to 300, inclusive, the court held that such a body was not so numerous that it could not be brought in and that because of the failure to bring the bondholders into court, the decree of foreclosure will not be conclusive upon them.

In the case at bar the bonds secured and issued under the trust deed from the Boston Water & Light Company to the International Trust Company, were 125, from number 1 to 125 inclusive, and were held *only by twenty-one (21) persons.* (Rec., 104.) An inquiry to the trustee would have undoubtedly secured the information who they were and where they resided. At any rate a publication would have reached the bondholders.

In the *Lebeck* case the court, in the course of the decision, said (p. 453):

> "Is he concluded by the decree in the former cause? The trustee of the property was a party to that decree, and this, it is insisted, binds the complainant.
>
> "In a court of law, the trustee of another is

regarded as the owner of the property. He is, there, the representative of the *cestui que trust.* The latter cannot properly be a party to a proceeding concerning the trust estate, in a court of law. If there is a dereliction on the part of the trustee in his representative character, calculated to injure the *cestui que trust;* if he is incompetent to properly assert and defend his legal rights in legal forums, or unfaithful therein, the *cestui que trust* may apply to equity to control his conduct and restrain the jurisdiction of legal tribunals, to the end of his full and complete protection. Hence, an action at law which proceeds to judgment against the trustee, unaffected by fraud, accident or mistake, binds the *cestui que trust. Frank* v. *Meyers,* 97 Ala., 437. But, in a court of equity, an entirely different doctrine obtains. There the *cestui que trust* is regarded as the owner of the property, and his own representative in reference thereto. He is, there, separate and distinct from the trustee, and, in a sense, the adversary of the latter. He prosecutes and defends his own interest, and shapes through the decrees of the court, the conduct of the trustee. Hence, unless there be something special in the terms of the trust, which confers upon the trustee the power and duty to represent, in courts of equity, the beneficial interests; unless a power of attorney, so to speak, is conferred upon him to represent those interests, in those forums, a decree in equity affecting the trust estate, rendered against the trustee, in the absence of the *cestui que trust,* is not binding upon the latter. The *cestui que trust* is an indispensable party to such proceedings, and he cannot be concluded unless he is made a party. *Collins* v. *Lofftus* (10 Leigh, 5), 34 Am. Dec., 719, and extended note at page 722, citing many authorities.

"We, of course, do not refer to that class of cases where the interested parties are so numer-

ous that it is impracticable to bring them all in and in which a class of persons may be brought in to represent others of similar interests. See interesting discussion of this subject in *Campbell* v. *Railroad Co.*, Wood's, 368. *The record in the suit of the Fort Wayne Bank did not bring the case within this exception. The bill professed to make all the bondholders parties, and made no allegation, either directly, or of facts going to show it, that it was impracticable to bring them in.*"

**"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party. * * *"**

*Old Wayne Life Ins. Assn. Co.* v. *McDonnough*, 204 U. S., 15, approving *Scott* v. *McNeal*, 154 U. S., 34, 46. (Per Mr. Justice Harland, on error to the Supreme Court of Indiana.)

**Due process of law requires that there shall be notice and opportunity for hearing given the parties.**

*Scott* v. *McNeal*, 154 U. S., 34, 46.
*Hagar* v. *Reclamation Dist.*, 111 U. S., 701.
*Hovey* v. *Elliott*, 167 U. S., 409.
*Roller* v. *Holly*, 176 U. S., 398.
*Londoner* v. *Denver*, 210 U. S., 373.
*Simon* v. *Craft*, 182 U. S., 437.
*Dean* v. *Nelson*, 10 Wall., 171.
*Lasere* v. *Rocherau*, 17 Wall., 437.
*Windsor* v. *McVeigh*, 93 U. S., 227.
*Old Wayne* v. *McDonough*, 204 U. S., 15.

As the rights of appellant bondholders were adjudged without notice to them and without their presence, and said decree is made the basis of the

present suit and is being enforced against them, it requires no argument that they were deprived of their property without due process of law, within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States, as set forth in the answer, and that the court erred in holding that the answer is insufficient and erred in granting the relief prayed for in the bill of complaint.

**The said Circuit Court erred in taking jurisdiction of this cause and in not holding that the bill of complaint herein falls within the inhibition contained in Section 720, Revised Statutes of the United States, expressly prohibiting the Federal courts from issuing injunctions to restrain proceedings in State courts. (Assignment of Error No. 3; Rec., 166.)**

The omission of making the bondholders parties does not preclude them from filing an independent suit in the State court and same will not be enjoined in United States court. The bill as to the bondholders is not ancillary but original.

*Oliver* v. *Parlin & Orendorff Co.*, 105 Fed., 272, decided by the Circuit Court of Appeals for the Fifth Circuit, is a direct authority against the position of appellee in filing its so-called ancillary bill.

That was a suit in equity in a Federal court, brought, among other things, to recover possession of certain real estate, and to cancel a deed of trust executed by prior owners thereon for fraud, and the grantors and grantees in such deed were made defendants. The grantees answered, under oath, that long before the commencement of the suit they had

sold and transferred the deed of trust and the notes secured thereby to a bank named, and disclaimed any interest in the property. After replications had been filed, the testimony taken, and the cause set down for hearing, the bank which owned the deed of trust commenced a suit for its foreclosure in a State court, and, in accordance with the practice, procured the issuance of a writ of sequestration, under which the sheriff took possession of the property. Held, that the Federal court had not acquired such priority of jurisdiction as authorized it, in view of the Rev. St., S. 720, which prohibits the granting of any injunction to stay proceedings in any court of a state, to enjoin the prosecution of the foreclosure suit in the State court, upon the filing of an amended bill by the complainant, in which for the first time the bank was made a party defendant.

In the course of the opinion Judge Pardee says (p. 276):

> "An examination of the cases which have attempted to follow *French* v. *Hay,* and *Dietzsch* v. *Huidekoper,* will show that in every well considered case, when an injunction restraining already instituted proceedings, in a State court has been issued by a United States court it was either based on a decree or judgment of the United States court which it was necessary and proper to enforce; or, if issued prior to judgment or decree, it was directed against a party who, after jurisdiction over him and the cause was fully vested, had resorted to proceedings in the State court necessarily conflicting with, if not ousting, the jurisdiction of the United States court. (See *Shoemaker* v. *French,* Fed. Cas., No. 12,800; *Sharon* v. *Terry* (C. C.), 36 Fed., 337; *Mutual Life Ins. Co.* v. *University of Chi-*

*cago* (C. C.), 6 Fed., 443; *Railroad Co.* v. *Kuteman*, 4 C. C. A., 503; 54 Fed., 551; *Abeel* v. *Culbertson* (C. C.), 56 Fed., 333; *President* v. *Merritt* (C. C.), 59 Fed., 7.)

"The present case shows that the Groesbeck National Bank acquired the note secured by the deed of trust involved in this controversy long prior to the maturity of the same, and long prior to the institution of the present suit in the Circuit Court, and that the said bank was neither a party nor a privy to the suit in the Circuit Court; in fact, the record shows that although the complainant was fully advised that the Groesbeck National Bank owned the note in question, and had acquired same prior to the filing of his bill, he neglected and refused to make the Groesbeck National Bank a party. Under these circumstances, we are of opinion that although the said bank, through its president, may have been fully informed, it was not compelled to intervene in the complainant's suit, nor to await the decision of issues pending therein between other parties, but had the right to commence, in a proper court, a suit for the determination of its rights, including a foreclosure of the deed held by it. It thus appears that the present case is clearly distinguishable from each and all of the cases wherein it has been held that notwithstanding the provisions of Section 720, Rev. St., the United States court might issue an injunction restraining instituted proceedings in a State court. If Section 720, Rev. St., means something, and is not to be emasculated by construction and exceptions, it means that, in cases like the present, no injunction shall be granted, 'to stay proceedings in any court of a state.' The order appealed from, so far as it restrains proceedings heretofore instituted in the State court, is reversed, and the cause is remanded to the Circuit Court, with instructions to further proceed as equity may require."

In *Central Trust Co.* v. *Grantham,* 83 Fed., 540, decided December 2, 1897, by the Circuit Court of Appeals, Seventh Circuit, where the court declined to take jurisdiction after decree against one Messick, who was not a party to the original proceedings and where the property was sold on foreclosure, without bringing in Messick in court.

The court says (p. 545, last paragraph):

> "The point that appellant was not a party to, and is hence not bound by the judgment of the State court, is doubtless well taken. * * * The Circuit Court of the United States cannot give the relief here prayed without interfering with the proceedings of the Circuit Court of Montgomery Co., Ind."

A court of the United States cannot enjoin proceedings in a State court.

*Guaranty Trust Co.* v. *North Chi. St. R. R. Co. et al.,* 130 Fed., 801.

*Diggs and Keith* v. *Wolcott,* 8 U. S. (4 Cranch., 179).

*Dial* v. *Reynolds,* 96 U. S., 340.

*Moran* v. *Sturges,* 154 U. S., 256.

*McKin* v. *Voorhies,* 7 Cranch., 279.

*Watson* v. *Jones,* 13 Wall., 679.

*Central National Bank* v. *Stevens,* 169 U. S., 432.

*Haines* v. *Carpenter,* 91 U. S., 254.

*In re Chetwood,* 165 U. S., 443.

**The court erred in not holding that the decrees entered by the Circuit Court of the United States for the Southern District of Illinois on December 23, 1903, and the decree of the same court entered May**

5, 1905, in the said suit of the Farmers' Loan and Trust Company against the New England Water Works Company, The Alton Water Works, the American Loan and Trust Company, Trustee, the United Water Works Company, Ltd., the Boston Water and Light Company, and the International Trust Company et al., as set forth in the bill of complaint and answer herein and illegally and improperly removed into said court from the Madison County Circuit Court of Illinois, are void and are inoperative as against the rights of these defendants, ~~because they were not made against the rights of these defendants,~~ because they were not made parties to said suit and were not brought into court in any manner as required by the Constitution and laws of the State of Illinois and by the law of the land, and had no notice whatever of the hearing thereof or of the pendency of said suit, as more fully appears in the answers of these defendants on file in this cause, reference thereto being had; and that, therefore, these defendants and appellants were deprived of their property by the said decrees without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America, said constitutional privileges having been fully claimed and set up in said answers filed by these defendants in said cause, reference thereto being had. (Assignment of Error No. 6; Rec., 166.)

The said Circuit Court of the United States erred in not holding that these defendants were necessary and indispensable parties to the foreclosure in the

**said suit of the Farmers' Loan and Trust Company v. The Said New England Water Works Company et al., and that the constitutional enactments and statutes of the State of Illinois and the decisions of the Supreme Court of Illinois are a part and parcel of the trust deed of The Boston Water and Light Company to the International Trust Company, Trustee, and constitute a contract within the meaning of Section Ten of Article One of the Constitution of the United States of America, which the courts of the United States are bound to respect and enforce; and that by reason of the said law of Illinois these defendants and appellants were entitled to have notice of the said foreclosure proceedings to protect their property and to be heard upon their contention in this behalf; and that the failure to make these defendants and appellants parties defendant to said cause operated to deprive these defendants and appellants of their property without due process of law contrary to the Constitution of the United States of America and the amendments thereto. (Assignment of Error No. 7; Rec., 167.)**

The above two assignments of error will be treated together. *They also go to the point that the bill in the present action is not an ancillary proceeding as against these appellants,* for if they were necessary and indispensable parties in the original foreclosure proceedings brought by the Farmers' Loan and Trust Company, their rights were not cut off by those proceedings, and, therefore, they had a right to institute the proceedings to foreclose their bonds in Madison County Circuit Court, and

any proceeding as against them would, of necessity, be original and not ancillary.

Section 7 of the Chancery Act of the State of Illinois must be taken to be a part of the trust deed of the Boston Water & Light Co. to the International Trust Co. It provides

(Sec. 7. Unknown Parties—affidavit—notice.)

> "In all suits in chancery and suits to obtain title to lands in any of the courts of this state, if there be persons interested in the same, whose names are unknown, it shall be lawful to make such persons parties to such suits or proceedings, by the name and description of unknown owners, or unknown heirs or devisees of any deceased persons who may have been interested in the subject-matter of the suit previous to his or her death; but in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown; and process shall be issued against all parties, by the name and description given as aforesaid; and notices given by publication, as is required in this act, shall be sufficient to authorize the court to hear and determine the suit, as though all parties had been sued by their proper names." (Chap. 22, Rev. St. of Ill.)

The Supreme Court of Illinois in many cases construed that section to be mandatory and held that all unknown owners of *bonds* and notes must be brought into court by publication, before the decree of foreclosure will be binding upon them.

We shall commence here with the case of *Gaytes* v. *Franklin Savings Bank*, 85 Ill., 256. The facts as they appear from the statement of the court, were as follows:

"On the 22nd day of May, 1874, Carol Gaytes filed his bill in the Superior Court against Mahlon D. Ogden, in which it is alleged the Riverside Improvement Company had issued its bonds in the sum of $50,000, payable to bearer, and secured the same by trust deed in the usual form, containing power of sale, in which Ogden was trustee for such parties as should become owners of the indebtedness. Default having been made, Ogden, at the instance of parties directly interested, advertised the property embraced in the trust deed for sale, to pay the indebtedness secured; and, at that sale, it is alleged, two lots were struck off to Gaytes on his bid, a written memorandum made of the sale, and that he tendered the amount of his bid, but the trustee refused to make him a deed. The original bill was for a specific performance of that alleged contract. Ogden and the Chicago and Northwestern Railway Company were made defendants, and served with process. Holders of indebtedness secured by trust deed were not made parties, and the reason alleged in the bill for such omission is, they were unknown. No defense was made by either defendant to that bill, and, on default of the defendants being entered, the cause was referred to a Master, and, on coming in of his report, the court rendered a decree on the testimony reported, in accordance with the prayer of the bill.

"On the 9th day of March, 1875, the Franklin Savings Bank filed a bill in the same court, to set aside the decree in the original suit, alleging it was owner and holder of the indebtedness secured by the deed of trust to Ogden; that that fact was known to Gaytes when he filed his bill for specific performance, and that all contrary allegations were untrue; that no memorandum of alleged sale was made; that the lots were sold at a sacrifice, and by mistake,

and that had it been made a party it could have successfully defended.

"On the hearing, the court entered a decree *pro forma* setting aside the decree in the original suit, and declaring the deed made under it null and void, but without prejudice to the right of Gaytes to bring another suit, if he should be so advised. Defendant Gaytes brings the case to this court on appeal."

On the above statement of facts, the Supreme Court, through Mr. Justice Scott, says (pages 257-8):

"Without entering upon any discussion of the merits of this case, we think the court failed to enter the proper decree. It appears complainant is, and was holder of the bonds secured by the deed of trust from the Riverside Improvement Company to Ogden, and whether that fact was known to defendant when he filed his bill to compel conveyance to himself of the lots he alleges he purchased at the sale under the deed of trust, is involved in much doubt by the evidence. But in any event, complainant, or whoever was owner of the indebtedness, was a necessary and indispensable party to that suit. Such owner could alone be affected by the decree. Ogden, being a mere trustee, had no real interests in the premises. Whether defendant had actual knowledge who were owners of the bonds, it was his duty to make inquiry on that subject. Had he done so, no difficulty would have been experienced in ascertaining names and residences of owners of the bonds for payment of which, and coupons attached, the property was about to be sold. Surely, Ogden, acting trustee, must have known who had declared all bonds due on account of failure to pay interest then matured, and on whose behalf he was making sale of the property, and, no doubt, would have disclosed all necessary information.

> Nothing appears in the facts of the original case to take it out of the general rule, that all parties whose interests would be directly affected by the decree, should be parties to the bill, otherwise they can not be concluded by any action of the court. Of course, no one is bound by a decree to which he is not a party, nor by a decree against another party, although acting on his behalf, who has no real interest in the subject matter of litigation. Before any one is concluded by judicial sentence, he must have his day in court."

And in the case of *Chandler* v. *Ward,* 188 Ill., 322, thirty trust deeds were involved and the notes scattered all over. Says the Supreme Court of Illinois at page 339:

> "The evidence clearly shows, that the notes secured by the trust deeds upon the lots in question were transferred or sold and delivered by Chandler & Co. to third parties. Surely, the holders of these notes are the persons most interested in this litigation, as detailed in the statement which precedes this opinion. None of these note holders were before the court when the decree below was rendered. It is true, that the original bill upon its face makes 'the unknown owners and holders of said notes and trust deeds' defendants thereto. But no steps were taken to bring such unknown owners and holders into court. No affidavit was filed, nor was any publication made as required by the statutes. Sec. 7 of the Chancery Act provides:
>
> " 'In all suits in chancery, and suits to obtain the title to lands, in any of the courts of this state, if there be persons interested in the same, whose names are unknown, it shall be lawful to make such persons parties to said suits or proceedings, by the name and description of unknown owners, etc.' The section

> further provides that 'in all such cases an affidavit shall be filed * * * stating that the names of such persons are unknown; and process shall be issued against all parties, by the name and description' as given therein and that 'notices given by publication, as required in this act, shall be sufficient to authorize the court to hear and determine the suit, as though all parties had been sued by the proper names.' (Starr & Cur. Ann. Stat., 2d Ed., p. 563.) Section 43 of the same act provides that: 'All decrees, orders, judgments and proceedings, made or had with respect to unknown persons, shall have the same effect, and be as binding and conclusive upon them, as though such suit or proceeding had been instituted against them by their proper names.' (*Ibid.*, p. 590.) As the holders of the notes were not parties, either in their individual names, or as unknown owners under the provisions of the statutes, the decree of the court below, which adjudicated upon their rights in their absence is clearly erroneous."

The same question was directly raised and decided in the case of *St. Louis Brewing Association* v. *Joseph Geppart,* 95 Ill. App., 187, where the trustee was made party defendant, but the unknown owners of the notes secured by the deed of trust were not made parties defendant to the suit. The excuse given for not bringing in the holders of the notes was that they were unknown to the complainant, but the court did not regard it as sufficient, pointing to the statute providing a mode for bringing in unknown parties and citing the *Chandler* case. The court held that the foreclosure was no bar to the action of the holders of notes that were not brought in into the original suit.

*Phoenix, etc., Insurance Co.* v. *Batchen*, 6 Ill. App., 621, was a bill in equity to enforce a mechanic's lien, making the trustee of the property a party defendant, but not joining the bondholders under the trust deed, either by name or as "unknown owners." The court says (p. 640):

> "The trustee in a deed of trust given to secure the payment of money to another person, is not the 'creditor' meant by the section of the statute above recited. The creditor is the person to whom the debt is owing. True, the trustee is a proper and, perhaps, a necessary party, to a proceeding for the enforcement of the mechanic's lien, but before the lien can be so enforced as to obtain priority over the incumbrance, the *cestui que trust* must, within the period limited by the statute, be made a party to the suit. * * * None of the lien suits were brought against the creditor owning these incumbrances within the six months, and no decree should have been rendered against or to its prejudice. The lien creditors failed to obtain priority over these deeds of trust either as to the buildings or land. In one of the lien suits, it is true, Francis Bradley was made a defendant in due time, and some question may arise as to whether their making him a party was not sufficient to give the petitioners in that suit a priority over the deeds of trust. He was the payee in the bonds, and there was nothing on record evidencing that the bonds had passed out of his hands. In point of fact, however, they were assigned by him to the insurance company on the very day of their date. The lien creditors knew that these bonds were negotiable securities, and were liable to be assigned. They were thus put upon inquiry, and it was their duty to ascertain whether at the time of bringing their suits the bonds still remained in the hands of the payee. If they desired to obtain a priority over the deeds of trust,

> they should have used at least reasonable diligence to learn the ownership of the indebtedness thereby secured. The record fails to show that any effort whatever was made to ascertain whether Bradley still held the bonds, nor does it appear that the petitioners may not have actually known of their negotiation to the insurance company. What would have been the position and rights of the petitioners had they made due inquiry and failed to ascertain the ownership of the bonds, we need not decide. We see no reason, however, why in that event they might not have availed themselves of the provisions of the chancery code in relation to unknown owners."

And *Dunphy* v. *Riddle,* 86 Ill., 22, was a petition to enforce a mechanics' lien to which a creditor or incumbrancer was made a party by amendment, but after the six months provided by the statute for the filing of such petitions. It was contended that the proceeding was *in rem* and therefore binding upon the incumbrancer, even if not made a party in time. The court, in answer to this contention, says (page 28):

> "We fail to perceive any aid to appellant from the suggestion that the proceeding is one *in rem.* It is not a proceeding *in rem* in any such sense, as that it is one binding on all the world, and that the decree therein binds or affects the rights of those not made parties to the suit. We do not see that it is any more a suit *in rem* than one to foreclose a mortgage, or to enforce a vendor's lien; or that it to any greater extent should affect persons not made, or until made, parties to the suit."

In *Clark* v. *Manning,* 95 Ill., 580, a suit to enforce a mechanics' lien, it was held necessary to join the

*cestui que trust* under a trust deed as well as the trustee, the court saying (p. 582):

> "It is insisted it was sufficient to make the trustee a party to bar the rights of the *cestui que trust*. A contrary construction of the section of the statutes cited has been sanctioned by a number of recent decisions of this court, so that it need not now be discussed as a new question. In *Dunphy* v. *Riddle*, 86 Ill., 22, it was held, a suit in mechanics' lien proceedings, although commenced against the owner of the property, cannot be considered as commenced against a creditor or incumbrancer having an interest in the property until he is made a party, and unless he is made a party within six months after the last payment for work done or materials furnished becomes due, the mechanic or materialman can obtain no priority as against such creditor or incumbrancer. To the same effect is *Crowl* v. *Nagle*, 86 Ill., 437. *Scanlan* v. *Cobb*, 85 Ill., 296, was a proceeding to set aside and cancel a deed of trust on account of the alleged insanity of the grantor, and it was held the person whose debt was secured, as well as the trustee, was an indispensable party to the bill. The case of *Gaytes* v. *Franklin Savings Bank*, 85 Ill., 256, is more nearly like the one at bar, both as to facts and the principle declared. There, as in this case, the trustee named in the deed of trust was made a party, but not the person whose debt was secured, and the holder of such indebtedness was declared to be an indispensable party, for the reason his interest alone would be affected by the decree—the trustee having no real interest in the subject matter of the controversy. That is precisely the case here. Laurence, whose debt was secured by the trust deed, was not made a party by amendment to the petition within six months after the last payment became due the mechanics for work

> done for the owner of the property, and under the construction given to the statute he will not be allowed to enforce his lien to the prejudice of such incumbrancer."

*Scanlan* v. *Cobb*, 85 Ill., 296, 300, was a bill to set aside a conveyance of property on the ground of insanity of the grantor. The trustee named in a deed of trust of the property was made a party to the bill, but not the beneficiary under the trust deed. This was held to be error, the court saying:

> "The bill discloses, as well as the answers and proofs, that after the execution of the deed by Mrs. Hendricks to Scanlan, Scanlan executed a deed of trust on the property to Lyman, as trustee, to secure a loan of $4,000 he had effected from Aaron C. Goodman, on the faith of this security, and to whom he gave his promissory note for the amount. Lyman had but the naked legal title, with the duty to sell on default of payment of the amount secured by his deed, when due, but the substantial equitable interest was in Goodman. The rule in such cases as to parties is thus stated in Story Equity Pleadings, Sec. 207: 'The general rule in cases of this sort is, that in suits respecting trust property, brought either by or against the trustees, the *cestuis que trust* (or beneficiaries), as well as the trustees, are necessary parties. And when the suit is by or against the *cestuis que trust* (or beneficiaries) the trustees also are necessary parties. The trustees have the legal interest, and therefore, they are necessary parties. The *cestuis que trust* (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore, they are necessary parties. * * * Goodman was clearly a necessary party, and it was error to deprive him of his security without giving him an opportunity to be heard."

This case was reaffirmed in *Vogle* v. *Brown,* 120 Ill., 338, where the court held that the holder of a debt not having been a party, is not bound by a decree of partition, although the trustee under the trust deed was a party to the suit.

**The Statutes of Illinois and decisions of the Supreme Court of Illinois relating to parties and the remedies provided in such cases are a rule of property and are binding on the Federal court.**

It will be observed that the original bill of the *Farmers' Loan and Trust Co.* v. *The New England Water Works Co. et al.,* was originally filed in Madison County Circuit Court to reach property situated wholly and exclusively within the State of Illinois, and in so far as the remedies and process were concerned, they were subject to the laws of the State of Illinois, and we submit that upon removal to the Federal courts, they are bound by the laws of the state as judicially determined by the courts of that state.

In the original suits, appellants, Allen A. Brown, *et al.,* were not made party defendants, either under their proper names, or under the name of "unknown owners," nor was the requisite affidavit filed as to unknown owners as the statute provides. There was no summons issued and no publication had against them and their right to foreclose is, therefore, not cut off by the proceedings in the Federal court.

In *Edwards* v. *Kearzey,* 96 U. S., 595, the court says (at page 607):

> "The remedy subsisting in a state when and where a contract is made and is to be per-

> formed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution of the United States, and is, therefore, void."

In *Interstate Assn.* v. *Edgefield Co.,* 120 Fed., the court says, at page 426:

> "What, then, is the contract? The bond and mortgage were drawn in South Carolina, and are being enforced in that state. The law of South Carolina will be followed in this court, so far as it may concern the proceedings for foreclosure, and manner and terms of the sale, the redemption of the land from the sale, and all things incident thereto. *Brine* v. *Insurance Co.,* 96 U. S., 627, 24 L. Ed., 858; *Insurance Co.* v. *Cushman,* 108 U. S., 51; 2 Sup. Ct., 236; 27 L. Ed., 648."

And it cannot be contended that the appellants lost any of their rights because the original foreclosure case was removed from the State to the Federal court.

In *Cowley* v. *No. Pac. R. R. Co.,* 159 U. S., 569; 40 L. Ed., 263, 267, the court says:

> "If any action or proceeding in a State court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal court no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal. While the Federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the stat-

> ute, with the original rights of the parties unchanged. * * *
>
> "Had the case never been removed to the Circuit Court, it would have proceeded in the State court as a special proceeding under the territorial statute and we are of opinion that, upon its removal to the Circuit Court, petitioner lost no right to which he would have been entitled had the case not been removed."

And in *Brine* v. *Hartford,* 96 U. S., 627, which was a bill to foreclose a mortgage, it was held at page 639, that

> "the proposition that the rules of practice in the Federal courts cannot be controlled by state statutes cannot be carried so far as to deny a person in the Federal courts of substantial rights conferred by the statute of a state, or to add to or take from a contract that which is made a part of it by the law of the state."

See, also,

*Abraham* v. *Casey,* 179 U. S., 210.

And right here we beg the indulgence of the court to make a distinction between a railroad mortgage where the property is situated in different states, and where the laws of no particular state can apply and a trust deed as in the case at bar made in Illinois upon property situated wholly and exclusively in that state and controlled by the laws of that state. If such distinction be applied the practice allowed in railroad foreclosure cases originally commenced in Federal courts, cannot apply to the case at bar, which was brought in the State court, under the state practice and removed to the Federal court.

**The court erred in not holding that the said decrees are void, because they were made and entered wholly outside and in excess of the issues made and presented in said cause between the parties litigant, to-wit: The Farmers' Loan and Trust Company, The Boston Water and Light Company and The International Trust Company, Trustee, as set forth in the twenty-sixth, twenty-seventh and twenty-eighth paragraphs of the answer of these defendants, reference thereto being had, and because said Circuit Court adjudicated conflicting and adverse rights of the claims to title between the Farmers' Loan and Trust Company, The Boston Water and Light Company and The International Trust Company, Trustee, whereas, said bill of the said Farmers' Loan and Trust Company was in substance merely a bill for foreclosure and accounting and had no allegations appropriate to justify the entering of the decree of sale in the manner and form as was entered in said cause; that, therefore, said decree of sale and the order confirming said sale took the property of these defendants and appellants which was never acquired, owned or mortgaged by the Alton Water Works Company, without due process of law and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America. (Assignment of Error No. 8; Rec., 167.)**

Upon the above assignment of error the answer of appellants (Sec. 26, Rec., 107) avers that in its original bill the Farmers' Loan and Trust Company did not assert any claim or ownership to the franchise granted in November, 1908, by the Village

of Upper Alton, to the Boston Water and Light Company, to do a general water business in said village; that there was no issue formed upon the ownership of that particular franchise, yet the decree on said cause (see decree "e" Rec., 8) directs the sale of that franchise in satisfaction of the Farmers' mortgage.

(The Farmers' bill is an exhibit to the answer and is found in printed record at p. 116, and the decree is set forth in the present bill of appellee, Rec., 8.)

And again there was no prayer in said bill to subject to an order of sale any choses of action belonging or standing in the name of the Boston Water and Light Company, yet the aforesaid decree orders the sale and takes from the Boston Company "also all rents, dues, demands, and choses of action of every kind and nature including water rents from Alton, *Upper Alton* and private consumers arising from water works system, with the right to collect the same" (see "f," Rec., 9), upon which appellants had a lien by virtue of the trust deed from Boston Water and Light Company to the International Trust Company (see trust deed, Rec., 32-33).

And again the Farmers' Company charged in its bill on *information and belief* that

> "Since the making of said trust deed to your orator the said mortgaged property has been extended and enlarged and particularly there have been laid water mains and water pipes in connction with said original water works extending east from the City of Alton into East Alton or Upper Alton and several miles of

water mains have been there laid which are supplied with water only through and from the water mains of said water works which were in operation at the time of the making of said trust deed to your orator. And your orator shows that said additional water mains were purchased and laid with money derived from the sale of the bonds secured by said trust deed to your orator and the earnings of said original water works plant, as your orator is informed and believes. There has also been built and installed a new pumping station on the bank of the Mississippi River about a mile above the pumping works in operation at the time said trust deed to your orator was made. Much of the machinery, especially the large pump which was in use in said old pumping station, and which is under the lien of said trust deed to your orator, has been by said Boston Water and Light Company, or the New England Water Works Company, moved from said old pumping works to said new pumping works, and now forms a large and effective part of said new pumping works, and without it said pumping works could not supply the water needed, and the pump so taken from said old pumpnig works is the pump that is now forcing water through all of said water works plant. Such removal was made fraudulently and for the purpose of attempting to remove said machinery from the lien of the trust deed to your orator, and it is still in the hands of the parties so removing it. And your orator states further, on information and belief, that the money used to acquire the property on which said new pumping works are situated and to build said new pumping works came from the earnings of the water works property so mortgaged to your orator."

That Section 15f of said bill prays for an accounting with the Boston Water and Light Company, as follows:

> "Your orator charges, on information and belief, that a large amount of moneys pledged to your orator was used and expended in erecting said new pumping works, and said New England Water Works Company has also paid to said Boston Water and Light Company large amounts of moneys in the form of so-called rental and dividends upon the capital stock of said Boston Company, which should be applied upon the cost of erecting said new pumping works. And your orator is therefore entitled to an accounting with said Boston Water and Light Company as to the amount so paid it" (p. 31 of bill).

(All of which allegations were denied by the respective defendants to said bill.)

That the aforesaid foreclosure decree of said court so far as it relates to the issues between the Farmers' Loan and Trust Company and the Boston Water and Light Company and International Trust Company, trustee, regarding the property and water plant in the Village of Upper Alton, is not in any way responsive to the allegations of the said bill of the Farmers' Loan and Trust Company, or any of the pleadings therein, for the following additional reasons, to-wit:

(a) Inasmuch as all of the allegations pertaining to the said property and water plant in the Village of Upper Alton were made by the Farmers' Loan and Trust Company upon information and belief, the only issue of fact thus created and to be tried is whether or not the complainant, the Farm-

ers' Loan and Trust Company, had so been informed and believed and does not put in issue any fact or facts pleaded in said bill regarding the equities of said property.

(b) That the allegations of the said bill of the Farmers' Loan and Trust Company, and the prayer thereof, being merely in the nature of a bill for an accounting as aforesaid between the Farmers' Loan and Trust Company and the Boston Water and Light Company and the International Trust Company, trustee; yet, the decree aforesaid of December 23, 1903, does not order an accounting as prayed for in said bill, and does not find that any amount whatever was wrongfully diverted from the earnings of the original plant of the old Alton Water Works Company in the City of Alton, into the water plant built by the Boston Water and Light Company in the Village of Upper Alton, and does not order any specific amount to be paid by the Boston Water and Light Company or the International Trust Company, its trustee, to relieve the property and water system in the Village of Upper Alton from the charge thus made by the bill, to-wit: the wrongful diversion of the funds. That instead, the said decree orders the said Boston Water and Light Company, the International Trust Company, trustee, to pay over to the Master in Chancery of said Circuit Court the entire indebtedness contracted by the Alton Water Works Company as found by the Master under the original mortgage of the Alton Water Works Company to the Farmers' Loan and Trust Company. Therefore, said Circuit Court of the United States, under the aforesaid is-

sues, was without jurisdiction to enter the decree aforesaid; and for the same reason was without jurisdiction to enter the decree on May 5, 1905, confirming the sale had pursuant to the aforesaid decree of December 23, 1903.

We respectfully submit that the said decree of sale of the Circuit Court of the United States, being in excess of the issues, was and is void for want of jurisdiction, and that property taken under same, amounts to a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

*Jones* v. *Davenport*, 44 N. J. Eq., 33;
*Corwithe* v. *Griffing*, 21 Barb., 9;
*Munday* v. *Vail*, 34 N. J. L., 418;
*Reynolds* v. *Stockton*, 43 N. J. E., 211;
*Dunlap* v. *Southerlin*, 63 Tex., 38;
*Reynolds* v. *Stockton*, 140 U. S., 254;
*Hovey* v. *Elliott*, 167 U. S., 445;
*Gille* v. *Emmons*, 58 Kan., 118;
Freeman on Judgments (4th Ed.), 120c.

In *Munday* v. *Vail*, 34 N. J. L., 418-24, the court, commenting upon the case of *Crowithe* v. *Griffing*, 21 Barb., 9, uses this language (at page 422):

> "It is impossible to concede that because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that the power of judicial decision arises. If, in an ordinary

> foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present, the single, but fatal flaw having been the absence from the record of any issue on the point determined."

In *Reynolds* v. *Stockton,* 140 U. S., 269, this court, referring to a quotation from *Munday* v. *Vail,* says:

> "We regard the views suggested in the quotation from the opinion as correct and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent proceeding *inter partes.*"

The *Reynolds* case was quoted and the principles there announced were reaffirmed in *Hovey* v. *Elliot,* 167 U. S., 445.

In *Hutts* v. *Martin,* 134 Ind., 592, the court says:

> "It is a general principle of law that courts have no power to adjudicate matters not involved in the issues in causes pending before them."

In *Seamster* v. *Blackstock,* 83 Va., 234, the rule is thus stated:

> "It is an elementary principle in our jurisprudence that jurisdiction of the subject-matter and parties is essential to the conclusive-

ness of a judgment or decree. And though a court may obtain jurisdiction rightfully, yet its decrees may be void, because in the progress of the cause, it has exceeded its jurisdiction. Thus, where a bill is filed to sell a certain lot, and a decree is entered for the sale of another and different lot, not named in the bill, and to which the bill has no relation, such decree, as respects the last mentioned lot, is a nullity."

In *Gille* v. *Emmons*, 58 Kansas, 118, the Supreme Court of that state, at page 120, says:

> "A court cannot determine matters not brought to its attention by some method known to the law, nor give effective judgment upon a cause or subject-matter not brought within the scope of its judicial power. Although it may have jurisdiction in the class of cases to which a cause belongs, it cannot exercise its power until it is invoked by the parties: and if it goes outside of the issues and adjudicates a question not submitted for its decision, the judgment is without force."

IN THE FOLLOWING FORECLOSURE CASES THE DECREES WERE HELD TO BE VOID BECAUSE IN EXCESS OF THE ISSUES PRESENTED BY THE BILL OF COMPLAINT.

*Spoors* v. *Coen*, 44 Ohio St., 497.

*Clapp* v. *McCabe*, 84 Hun (N. Y.), 379; approved in *Allen* v. *Farmers L. & T. Co.*, 8 N. Y. App. Div., 33, and in *Clapp* v. *McCabe*, 155 N. Y. Rep. (Court of Appeals, 525; affirming 84 Hun, 379).

**That the said Circuit Court erred in refusing to hold that it had no jurisdiction to hear and determine the suit of the Farmers' Loan and Trust Company v. The New England Water Works Company,**

**The Alton Water Works Company, The American Loan and Trust Company, Trustee, and the United Water Works Company et al., as is more fully identified in the bill and answer in this cause, on the ground that said cause was illegally and improperly removed from the Madison County Circuit Court to the said United States Circuit Court for the Southern District of Illinois, said cause not being a removable cause within the meaning of the law in such cases made and provided, and not having been removed until after answer was filed by the removing defendant. (Assignment of Error No. 5; Rec., 166.)**

It is our view that inasmuch as appellants were not parties to the original foreclosure proceedings and could not have a review of the decree in question by a direct appeal or writ of error, and, inasmuch as the title of appellee and the right to bring the present suit, are based upon said original foreclosure decree, appellants have the right to show that the said U. S. Circuit Court was utterly without jurisdiction as a court of the United States to hear and determine the cause in which it entered a decree now sought to be enforced against them.

In *Thompson* v. *Tolmie,* 2 Pet., 157, the language of the court is:

> "If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no jurisdiction, and may be rejected when collaterally drawn in question."
>
> The objections made to these decrees go directly to their validity. It is not mere irregularities, or errors, of which complaint is made. The jurisdiction of the court to render the de-

crees is denied. This question of jurisdiction must, therefore, be investigated.

The jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, *by a party claiming the benefit of such proceedings.*

*Williamson* v. *Berry*, 8 How., 496-541.
*Reynolds* v. *Stockton*, 140 U. S., 255.
*Hovey* v. *Elliott*, 167 U. S., 446.
1 Black on Judgment, Sec. 242.
*Elliott* v. *Piersol*, 1 Peters, 329 and 340.
*Windsor* v. *McVeigh*, 93 U. S., 275.
*U. S.* v. *Walker*, 109 U. S., 258 and 251.
*Shriver* v. *Lynn*, 43 U. S., 43.
*Guaranty Trust & S. D. Co.* v. *Green Cove R. Co.*, 139 U. S., 137.
*Ex parte Lange*, 85 U. S., 177.
*Thompson* v. *Whitman*, 85 U. S., 467.
*Hickey* v. *Stewart*, 44 U. S., 750.
*Corwithe* v. *Griffing*, 21 Barb., 10 and 15.
*Spoors* v. *Coen*, 44 O. St., 497.

From the bill and answer in the case at bar (see particularly paragraphs 5 to 13 of the answer and exhibits therein referred to, Rec., 95 to 99), it appears that this litigation was inaugurated by the filing of a creditor's bill by the United Water Works Company. Ltd., a corporation organized under the laws of the State of New York, in the Circuit Court of Madison County, Illinois, on the 13th of June, 1900. (See also Bill, Rec., 5.)

That bill (see Answer, p. 11; Rec., 97) was a creditor's bill and the New England Water Works Company, a corporation organized under the laws of the State of Rhode Island, was apparently made sole defendant therein, as the bill was originally filed; but on the same day the complainant filed an amendment to the bill making the Alton Water Works Company, a corporation organized under the laws of Illinois, the Farmers' Loan and Trust Company, a corporation organized under the laws of New York, the American Loan and Trust Company, a corporation organized under the laws of Massachusetts, Anson M. Lyman a citizen of Massachusetts, and Charles A. Caldwell, a citizen of the State of Illinois, parties defendant thereto. The citizenship of the various parties is not stated in the amendment to the bill, but appears in the removal petition. (See Petition for Removal, Rec., 144.) Thereafter the original bill of the Farmers' Loan and Trust Company was filed in the same Madison County Court on the 17th of November, 1900, and to that bill were made defendants the New England Water Works Company, the Alton Water Works Company, the American Loan and Trust Company, the United Water Works Company, a corporation of New York, the Boston Water and Light Company, a corporation organized under the laws of the State of Maine, the International Trust Company, trustee, a corporation organized under the laws of Massachusetts, Charles A. Caldwell, trustee, a citizen of Illinois, and Anson M. Lyman, trustee, a citizen of Massachusetts, and also the unknown owners of the promissory notes se-

cured by the chattel mortgage from the New England Water Works Company to Lyman. None of the owners of such notes have appeared in said action. The suit of the United Water Works Company was thereafter consolidated with the foreclosure suit brought by the Farmers' Loan and Trust Company.

We have then in said consolidated case (see Bill of Alton Water Co.; Rec., 5), first, a creditor's bill by the United Water Works Company, Limited, against the New England Water Works Company, and all of the defendants except the Boston Water and Light Company, and the International Trust Company, and to which also the Farmers' Loan and Trust Company was a party, and then a bill by the Farmers' Loan and Trust Company against the United Water Works Company, all of the parties named as defendants in the bill of the latter company, and the Boston Water and Light Company and the International Trust Company. It will be noticed that the bill of the Farmers' Loan and Trust Company (Rec., 116) was a bill filed by a citizen of New York, against a number of defendants, citizens of other states, and the United Water Works Company, Limited, also a citizen of New York. This was a bill to foreclose a mortgage given by the Alton Water Works Company, a citizen of Illinois, upon its property, reciting the circumstances, as to the execution of a trust deed by the same grantor to Charles A. Caldwell, trustee; his death and the fact that his son, who was made a defendant to that bill, had succeeded as trustee, and that there was outstanding of the bonds secured by the deed of trust

to Caldwell $46,000 on the 1st of January, 1887, the date of the trust deed executed to the Farmers' Loan and Trust Company, and also reciting that fifteen of the bonds secured by the latter deed had been exchanged for $15,000 in bonds secured by the trust deed to Caldwell, which latter bonds were then held by the Farmers' Loan and Trust Company.

It would appear, therefore, as if there were a controversy in said case between the Farmers' Loan and Trust Company, a citizen of New York, and Charles A. Caldwell, a citizen of Illinois, on the one hand, and among others the Alton Water Works Company, a citizen of Illinois, and the United Water Works Company, a citizen of New York, on the other hand. In this bill (Rec., 116), the complainant prayed that the amount found due upon the bonds issued under the provisions of the trust deed to Caldwell and the complainant might be found to be a lien upon the property prior to all rights, interests and liens of all the other parties to the suit; that the equitable ownership of the new pumping works and the additional mains, this being the new property constructed and owned by the Boston Water and Light Company, might be ascertained and decreed and the amount due thereon and paid thereon may be ascertained and provided for; that the Alton Water Works Company and the New England Water Works Company might be decreed to pay the amount so found due upon said bonds and the coupons and interest thereon; that in default thereof the property and franchises of the Alton Water Works Company and the New England Water Works Company covered by the trust deeds to Caldwell and the com-

plainant, might be sold to satisfy the amount so found due; that out of the proceeds there should be paid, first, the cost and expenses of the complainant in the suit and the residue should be applied to the amount due upon these mortgage bonds and coupons with interest, any surplus to be applied in such a way as the court should direct; and that upon any such foreclosure, all the defendants and all persons claiming by them or under them since the beginning of the suit should be barred of and from any equity of redemption in and to "said property and franchises"; that any deficiency on such sale should be entered in that suit as a judgment against the Alton Water Works Company, together with a prayer for general relief.

In the case of the United Water Works Company, Limited, against the New England Water Works Company, and others, the Farmers' Loan and Trust Company was also made a party defendant and it is quite apparent that in that case, treated as a separate case, there was a controversy between the complainant therein, a citizen of the State of New York, and among others, the Farmers' Loan and Trust Company, one of the defendants, also a citizen of the State of New York.

As neither the Boston Water and Light Company nor the International Trust Company was named as a defendant to that bill obviously this case, treated as a separate case, could not be removed upon the allegation of any separable controversy existing between the complainant and either of these parties.

This being the state of the record on the 4th of January, 1901, the Boston Water and Light Company after filing its answer to said bill in the state court alone filed its petition for removal of these consolidated causes to the Circuit Court of the United States for the Southern District of Illinois. (See Petition, Rec., 144.) The petition alleged that each of these suits was of a civil nature in equity; that petitioner was not a party to the suit brought by the United Water Works Company, Limited, nor in any manner interested in the property or matters in controversy therein, but that in the suit brought by the Farmers' Loan and Trust Company there was a controversy which was wholly between citizens of different states and which could be fully determined as between them, viz., a controversy between petitioner, a citizen of the State of Maine, and the complainant, the Farmers' Loan and Trust Company, a citizen of the State of New York; that this controversy was of the following nature, viz., an effort on the part of complainant by this bill of complaint to subject to the lien of the deed of trust sought to be foreclosed, certain real estate described in its bill, but not in its deed of trust, together with the pumping house, filters and other improvements thereon and certain lines of water mains and fixtures connected therewith laid in the City of Alton and Village of Upper Alton, in which property neither the Alton Water Works Company, the maker of said deed of trust, nor its successor nor assigns ever had any title, interest, ownership or right of possession, but which, on the contrary, were purchased, built and laid by petitioner, with

its own funds, for its own uses and purposes, as owner thereof, and which had been long before and at the time said suits were commenced in the exclusive possession of petitioner as sole owner and so remained until the receiver appointed deprived petitioner of the possession of this property, of which the petitioner was the owner in fee; that petitioner and complainant were both actually interested in this controversy and that the matter in dispute therein exceeded, exclusive of interest and costs, the sum or value of $2,000.

On the 7th of January, 1901, an order was entered removing the cause to the Federal court for the Southern District of this State.

We take it that it is now well settled that no suit can be removed from a State court to a Federal court under the provisions of Section 2 of the removal act, *except such as might have been originally brought in a Federal court.*

In *Arkansas* v. *Kansas & Texas Coal Co. et al.,* 183 U. S., 185, Mr. Chief Justice Fuller stating (page 188) that the general policy of the present act was to restrict the jurisdiction of the Circuit Courts of the nation, remarked:

> "Those cases and those cases only were made removable under Section 2 in respect of which original jurisdiction was given to the Circuit Court by Section 1."

In a case in the Western Circuit of Arkansas, Judge Rogers announced similar doctrine in *McKown* v. *Kansas & Texas Coal Co.,* 105 Fed. R., 657-658. He there said, citing numerous cases:

> "That no suit can be removed under the act of 1887, to the Federal Court which could not have been originally instituted in that court."

It is perhaps not necessary, in the view that we take of this question, to say that this means that there can be no removal of a case brought in a State court by a party not a citizen or resident of the Federal district in which the suit is brought, where the jurisdiction is founded only on the fact of diversity of citizenship. Of course, if that be the correct view, it is quite obvious that if there were a controversy between the Farmers' Loan and Trust Company, a citizen of New York, and the Boston Water and Light Company, a citizen of Maine, of the nature indicated in the petition for removal, it could not be made the subject of a suit brought in the Federal court for the Southern District of Illinois, because the only ground of jurisdiction being diversity of citizenship, neither the plaintiff nor the defendant resided in that district; and if this be the test of the right to remove, such a case, of course, if brought in a State court, would not be removable.

It is, we think, too plain for controversy that this was not a removable case upon other consideration. In the first place, where a bill is brought to foreclose a mortgage making various parties having interests in the property mortgaged parties defendant, for the purpose of barring and foreclosing them from all interest in that property, if they have such an interest as to be proper parties to such a bill, it is practically impossible that there should be any controversy between any one of such defend-

ants and the complainant, so far wholly between them and which can be so fully determined as between them as to come within this provision of the statute. Such was the express ruling of the Court of Appeals for the Sixth Circuit in *Tug River Coal and Salt Co.* v. *Brigel,* 67 Fed. R., 625. The only difference between that case and this is that in that case the suit was originally brought in the Federal court for the District of Kentucky and it appeared that certain of the defendants were citizens of the same state with the complainants, who brought suit to foreclose their mortgage. The only ground of jurisdiction was diversity of citizenship. The court reviewed many decisions upon this point and then said at p. 628:

> "It is insisted by appellees that the trustee on one side and the Tug River Coal and Salt Co., the mortgagor, on the other, are the only necessary parties, and that the presence of the other parties does not defeat jurisdiction. In view of what has been said as to the object of the suit and the relief asked, we think this position is wholly untenable. The question of necessary parties is not determined by any designation of the bill as a foreclosure or vendor's bill, etc., but upon the objects stated and relief sought in the particular case. Within certain limits this may be restricted or enlarged as complainants may choose. If the bill had been for foreclosure merely and against the mortgagor company, although brought as a creditor's bill, the jurisdiction having once attached would not have been defeated by interventions by these parties for the purpose of litigating their claims. (Citing cases.) * * *
>
> "It is urged that the defendant creditors may be arranged on the side with the trustees,

> their interest being the same. We have seen that exactly the character of interest claimed by Ault and Wyborg does not fully appear. There can be no doubt that, as the bill states the case these parties are interested adversely to the trustees. This is the only reasonable construction of the bill; and whether this might be shown subsequently to be untrue, for the purpose of removing the jurisdictional objection it is not necessary to decide. The bill asks that the right of redemption be cut off; that these defendants set up their claims and liens; that the court pass on all questions, so that the purchaser may obtain title free from all such claims; and (not mentioning other points) Leo A. Brigel and J. D. Barrett set up claims, parts of which are for taxes paid, and which would be entitled to priority over the bonds. We think their interests are so far different and adverse as to prevent their being arranged as suggested."

This decision is entirely applicable to this case. It establishes the proposition that where a bill to foreclose a mortgage makes judgment creditors and other interested in the property parties defendant, the object being to sell a perfect title, by cutting off all adverse rights and liens and to settle all questions to priority and to proceeds of sale, all parties defendant are necessary parties and if any of them are citizens of the same state with any of complainants, the controversy is not wholly between citizens of different states. The United Water Works Company being a citizen of New York, of which also the complainant is a citizen, it is obvious that this case is not removable by any of the defendants; and unless there is in it a controversy between citizens of different states and which can be fully determined

as between them, it is not removable by any of the defendants; and we think it is equally obvious under the case cited that such controversy as existed between the complainant, the Farmers' Loan & Trust Company, and the Boston Water and Light Company was incidental to and a part of the suit brought to foreclose the mortgage. The decision of Judge Clark, who wrote the opinion, is supported by ample authority and we will not burden the court with a review of same, and he relied largely upon the case of *Wilson* v. *Oswego*, 151 U. S., 56.

Probably the leading case in this court as to what constitutes a separable controversy under the removal statute is the case of *Torrence* v. *Shedd*, 144 U. S., 527.

This was a bill for partition filed originally in the Superior Court of Cook County by the late General Torrence against Susan M. Shedd, John B. Brown and many others, the complainant claiming an undivided one-third of the property in question under a deed from one Edward Sorin. After one hearing of the case and a reversal by the Supreme Court of Illinois, Sorin was permitted, against complainant's objection, to intervene, and file an answer and cross-bill, admitting his deed to complainant but alleging that it was in trust for Sorin and that complainant in violation of the trust had refused to reconvey and had agreed to convey to Brown. Sorin claimed an equitable title in whatever should be set off to complainant. Shortly thereafter complainant and Brown filed a petition to remove this case to the Circuit Court of the United States for this district, alleging that by reason of Sorin's in-

tervention a separate controversy was presented between citizens of different states which could be fully determined as between them in that court; that petitioners were citizens of Illinois and Soring was a citizen of Indiana and none of the other defendants were citizens of Indiana or had any interest in the controversy. The case was removed accordingly into the Circuit Court for this district and resulted adversely to Sorin, but thereafter he and General Torrence and Mr. Brown made some settlement which was shown by stipulation in the cause. Thereupon the plaintiff filed a motion to remand the cause to the State court on the ground that the controversy which had been made the basis of the removal had been adjusted.

The attempt to remove was made under the Act of 1875, which, as the court will remember, permitted either party to remove.

Mr. Justice Gray, delivering the opinion of the court, held that there was in this case no separate controversy and reversed the judgment against the complainant, and remanded the cause to the Circuit Court with directions to render judgment against complainant for costs in that court and to remand the case to the State court. In the course of his opinion, this learned and accurate Judge said:

> "But in order to justify such removal on the ground of a separate controversy as between citizens of different states there must, by the very terms of the statute, be a controversy which can be fully determined as between them; and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between

them and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit."

To this proposition many cases are cited. And the court further said:

"Accordingly in a suit by a judgment creditor to have the property of his debtor sold and applied to the payment of his debt, after satisfying prior incumbrances thereon, the holders of which are made defendants, it has more than once been decided that there is no such separate controversy between the plaintiff and the holder of such an incumbrance as will justify a removal; and this for the following reasons: There is but a single cause of action; the equitable execution of a judgment against the property of the judgment debtor; and this cause of action is not divisible. The judgment sought against the incumbrancer is incidental to the main purpose of the suit and the fact that this incident relates to him alone does not separate this part of the controversy from the rest of the action. What the plaintiff wants is not partial relief settling his rights in the property as against this defendant alone, but a complete decree which will give him a sale of the entire property free of all incumbrance and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this defendant shows the question that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which the plaintiff seeks, requires the presence of all the defendants and the settlement not of one only, but of all the branches of the case."

And again the court remarked:

"The object of the suit was not merely the

> establishment of the title of the plaintiff in an undivided share of the land, but it was the partition of the whole land and the conversion of his undivided share into an entire estate in a proportional part as well as the establishment of his title against all the defendants. The controversy between the plaintiff and Brown and Sorin related only to the title claimed by the plaintiff in an undivided share; Sorin's whole claim was of an equitable estate in whatever should be set off to the plaintiff; and the other defendants denied that either the plaintiff or Brown or Sorin had any title whatever. Not one of the three, therefore, could recover judgment setting off to him any share in the land, without establishing a title, not only as between themselves, but also as against all the other defendants. The inevitable result is that the controversy of the plaintiff and Brown with Sorin was merely incidental to the main object of the suit, could not be determined as between them without the presence of the other defendants, and did not constitute such a separate controversy as would justify a removal into the Circuit Court of the United States."

After referring to the effect of the stipulation the court concluded with this remark:

> "But it is unnecessary to dwell upon that view of the case because, for the reasons above stated, the original removal on the petition of the appellant was wrongful."

It is true, perhaps, that there is nothing in this record to indicate that the defendants, the Alton Water Works Company and the New England Company, claimed any title to or interest in the property claimed by the Boston Company. To that extent this case differs from the case just cited; but it is

not true that these defendants were not in a measure interested in the determination of this question. The Alton Water Works Company was the original mortgagor. A deficiency decree is sought in the bill against this company. It was, therefore, an indispensable party to this bill. The New England Company is also an indispensable party as the party in possession of a large part of the property sought to be foreclosed. The amount of the deficiency, if any, to be adjudged against the Alton Water Works Company necessarily depended to some extent upon the question whether or not the property of the Boston Water and Light Company was subject to sale under this provision; and it cannot be seriously questioned that both the Alton Water Works Company, the original mortgagor, and its successor in title, the New England Company, were necessary parties to any controversy touching the right of complainants to subject the property of the Boston Water and Light Company to their mortgages.

It appears also that in substance Caldwell, the trustee, under the original mortgage and a citizen of Illinois, was interested in this controversy and is to be regarded as a co-complainant for the purpose of determining the jurisdiction of the court below. We should then have, assuming, what we by no means concede, that there was a separate controversy in this suit within the meaning of the statute, a controversy between the Farmers' Loan and Trust Company, a citizen of New York, and Caldwell, trustee, a citizen of Illinois, on the one side, and the Boston Water and Light Company, a citi-

zen of Maine, the International Trust Company, the holder of its bonds secured by mortgage on the property in controversy, a citizen of Massachusetts, the New England Water Works Company, a citizen of Rhode Island, the United Water Works Company, a citizen of New York, a judgment creditor, and the Alton Water Works Company, a citizen of Illinois; all of these parties were necessary parties to this controversy if it be treated as a controversy so far separate from the main purpose of the suit as to come within the terms of the act. The petition for removal states no such controversy, but alleges a separate controversy between the complainant, the Farmers' Loan and Trust Company and the Boston Water and Light Company. Waiving the question whether, if such a controversy in fact appears on the record, though not alleged in the petition, as would warrant less than all of the defendants in the case in removing the case, and waiving all consideration of the question as to whether any others should then join in the application besides any one of the defendants interested in such controversy, it is perfectly apparent that this is not a controversy which could be fully determined as between them. There are necessary parties on the one side, to-wit, Caldwell, trustee, a citizen of Illinois, and on the other side the Alton Water Works Company, also a citizen of Illinois. The bill sought to subject the property of the Boston Water and Light Company not only to the lien of the Farmers' Loan and Trust Company but to the lien of the trust deed to Caldwell, trustee, on the 28th of June, 1901, filed a cross-bill in the case brought by the United

Water Works Company, Limited, in the Circuit Court of Madison County, filing his bill in that court for some reason.

But there was no separate controversy in that case. There was but a single cause of action asserted in the bill of the Farmers' Loan and Trust Company, or if the two trust deeds one by the Alton Water Works Company and the other by the Boston Water and Light Company be regarded as creating two separate causes of action, then these two causes of action related according to the theory of the bill of the Farmers' Loan and Trust Company to the same property supposed to be part of the same water system; and the cause of action set up in said bill was the right to have all this property, including the property of the Boston Water and Light Company, subjected to the lien of the Alton Water Works Company trust deed.

*Torrence* v. *Shedd*, 144 U. S., 527.
*Graves* v. *Corbin*, 132 U. S., 571.

There is a striking analogy between the cases cited and the case made or attempted to be made, by the bill of the Farmers' Loan and Trust Company in this case. (See Bill; Rec., 116.) By the bill in that case it is alleged that the property in controversy has been acquired by the Boston Water and Light Company in fraud of the rights of the complainants and that in equity and good conscience it should be regarded as so far the property of the original mortgagor, or its successor in title and estate, as to bring it within the terms of

the mortgage and subject to the lien of the indebtedness thereby secured.

In the last two of the cases above cited we may note in passing, the judgments of the Circuit Court of the United States were reversed at the instance of the removing parties.

The case of *Torrence* v. *Shedd* was quoted and approved and followed in *C. R. I. & P. Ry.* v. *Martin,* 178 U. S., 245. This case is specially important only as confirming what had already been decided and that the Act of 1888 is to be construed precisely as was the Act of 1875, under which *Torrence* v. *Shedd* and *Graves* v. *Corbin* arose.

This was also the ruling in *Smedley* v. *Smedley,* 110 Fed., 255, and *MacGinnis* v. *Mining Co.,* 119 Fed., 96.

In addition to the other considerations suggested this is material, because if there were a separate controversy here in this case, as distinguished from the main cause of action, the Alton Water Works Company, the original mortgagor, was undoubtedly an indispensable party to such a controversy, and being a citizen of Illinois, could not under this authority, join in an application for removal.

For a case on similar facts we refer the court to the case of *Weldon* v. *Fritzker,* 128 Fed., 608, where it has been held that an action in a State court, brought by a mortgagee and their creditor, claiming a mortgage lien on the property to obtain a decree foreclosing his mortgage, being the amount of the mortgage debt due and unpaid, adjusting the liens upon the property, and adjudging their priority, presents but a single controversy.

The general doctrine that where a cause of action is joint, the mere fact that there are separable defenses, does not establish the fact that there is a separable controversy, is held by the Circuit Court of Appeals of the Fifth Circuit in a recent case—*Dougherty* v. *Yazoo & M. R. R. Co.*, 122 Fed. R., 205. The court relies on the decision of *Railway* v. *Martin*, 178 U. S., 245, which cites *Torrence* v. *Shedd*, and other cases.

See, also,

*Foulk* v. *Gray*, 120 Fed. R., 156.

**PETITION FOR REMOVAL WAS FILED AFTER ANSWER.**

The answer (Sec. 11; Rec., 98), which stands admitted for the purposes of this case, shows that the petition for removal was filed by the Boston Water and Light Company after filing its answer in the State court. This was too late, the case could not then be removed and the Federal court obtained no jurisdiction.

1 Desty Fed. Procedure, Sec. 108, and cases cited.

**The Circuit Court of the United States erred in not holding that it had no jurisdiction as a federal court over the subject matter and the parties in this cause upon the grounds set forth in the several answers of these defendants as to the jurisdiction of said court in overruling each and every contention regarding such jurisdiction as set forth in the an-**

swers of these defendants, reference thereto being made. **(Assignment of Error No. 2; Rec., 166.)**

**The said Circuit Court erred in holding and deciding that the facts stated in the several answers filed by these defendants in this cause were not sufficient to constitute a defense to the cause of action in the complaint of the said The Alton Water Company, complainant herein. (Assignment of Error No. 10; Rec., 167.)**

The brief of argument already presented upon other specific assignment of errors sufficiently covers the above assignment, and relying upon same, we deem it unnecessary to re-state here our position upon the same subject.

**The Circuit Court erred in not holding that under the admitted facts as set forth in the anser it is inequitable to enforce against these defendants the said decrees entered in said Circuit Court of December 23, 1903, and May 5, 1905, the equities being entirely with these defendants. (Assignmnet of Error No. 9; Rec., 167.)**

The facts as set up in the answer were confessed when same was set down for hearing on bill and answer. (1 Barbour's Chan. Prac., p. 120.) The answer shows a case which makes it extremely inequitable to enforce against appellants the said decrees entered in the Farmers' Loan and Trust Company on December 23, 1903, and May 5, 1905, by any supplementary or ancillary proceedings.

WHEN A PARTY RETURNS TO A COURT OF EQUITY TO OBTAIN ITS AID IN EXECUTING OR ENFORCING A FORMER DECREE OF THAT COURT, IT IS OPEN FOR THE COURT, ON

THE NEW BILL, TO INQUIRE INTO THE EQUITIES OF THE PARTIES, AND IF IT BE OF THE OPINION THAT THE FORMER DECREE WAS ERRONEOUS OR INEQUITABLE, IT MAY REFUSE RELIEF.

*Gay* v. *Pappart*, 16 Otto (106 U. S.), 679-69; approving *Waldhan* v. *Gay*, 73 Ill., 414.

*Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S., 552.

*Nat. Foundry Co.* v. *Water Supply Co.*, 113 Fed., 804, and cases cited.

The doctrine upon which these cases rest is that a court of equity will not, at any time, give its aid in the perpetration of a wrong and that even after decree.

It appears from the answer (par. 17; Rec., 102-104), that appellants bought their bonds in good faith in the open market after a franchise was voted to the Boston Water and Light Company by the trustees of the Village of Upper Alton, in consideration of a public service to be rendered to the people of that village by the Boston Company. (See Ordinances, Rec., 147.)

That under these ordinances the said Boston Company proceeded to erect the necessary water plant in said village, and for the purpose of raising the necessary funds to carry out the provisions of said ordinances as well as to acquire land, erect and pay for its pumping station and filter plant and other property, it created the bond issue in question here, and secured the same upon all its lands, filters, pipes, franchises and assets by its trust deed to the International Trust Company, trustee; that the water

plant was duly installed, completed and paid for with the money realized out of the sale of these bonds, and from no other source whatever. Upon this state of facts it is difficult to perceive upon what principle of law or morals the property of appellant-bondholders was taken in satisfaction of the Farmers' mortgage. How, FOR EXAMPLE, CAN THE FRANCHISE GRANTED TO THE BOSTON WATER AND LIGHT COMPANY, BY THE VILLAGE OF UPPER ALTON IN CONSIDERATION OF A PUBLIC SERVICE TO BE PERFORMED BY THAT COMPANY BE AFTER ACQUIRED PROPERTY OF THE OLD ALTON WATER WORKS COMPANY OR THE NEW ENGLAND WATER COMPANY, ITS SUCCESSOR? The answer to it is that to obtain a decree of that kind, all of this was only possible because appellants were not parties to that decree and had no voice in those proceedings. We, therefore, pray the court to hold that under this state of the record appellee was not, and is not entitled to the relief prayed for and as was decreed by the court below in this case.

**The said Circuit Court erred in entering the decree in this cause and in enjoining these defendants in the manner and form as set forth in the decree now appealed from and in entering judgment for costs against these defendants, and in granting the relief prayed for in the bill of complaint herein. (Assignment of Error No. 12; Rec., 168.)**

**That the final decree entered in the above entitled cause deprives these defendants and appellants of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and**

**makes it impossible for them by any legal process to secure their rights in any court of law or equity in the land. (Assignment of Error No. 13; Rec., 168.)**

By the mandatory injunction decreed against appellants in this case they are prevented from securing their rights and they are held bound by the original decree in the *Farmers'* case to which they were not parties and of which they had no notice. They are therefore deprived of their property without due process of law within the meaning of the Federal Constitution. In view of what has been said in this brief upon the other assignments of error, we believe that this court must come to the conclusion that the decree entered in the case at bar is erroneous and ought to be reversed.

## Conclusion.

Upon broad reasoning it must appear that if the money of these appellant-bondholders created the property in question which was taken from them without a hearing to satisfy some other mortgage of a different grantor and different corporation, they ought to be given a chance to present their rights. How the franchise specially granted by the Village of Upper Alton to the Boston Water and Light Company in consideration of public service, and the water plant in that village and the new pumping station built by the Boston Company nearly six years after the Alton Water Works Company had conveyed all its property and franchises to the New England Water Works Company, and

thus went out of business and was then without capacity to acquire any property to be annexed to, or to become a part of the old plant, which it had previously conveyed as aforesaid, could have been transformed into "after acquired property" of the Alton Water Works Company is hard to comprehend, but this all happened because the bondholders were not in court, and had no chance to present their case to the court, although upon principle of natural justice they should have been heard before their property was confiscated.

We believe that this is a clear case of deprivation of property without due process of law within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States, and that the decree enjoining appellants from proceeding in the State court is contrary to natural justice; that neither the United States Court of Appeals nor the United States Circuit Court for the Southern District acted within their jurisdiction.

For the various reasons stated in this brief, we respectfully pray that the decree in this case rendered by the Circuit Court of the United States for the Southern District of Illinois may be reversed.

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,
*Attorneys for Appellants*

## APPENDIX "A."

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.
October Term, 1906.

No. 1335. January Session, 1907.

James Hamilton Lewis, *Plaintiff in Error,* *vs.* Samuel Peck, G. Ralph Leighton, Charles G. Sanford, and Russell Frost. } *Error to the Circuit Court of the United States for the Southern District of Illinois.*

BEFORE GROSSCUP, BAKER AND SEAMAN,
CIRCUIT JUDGES.

This writ of error brings for review a judgment of the Circuit Court and sentence of imprisonment against the plaintiff in error, James Hamilton Lewis, upon finding of contempt of court, in the violation of an injunctional order of such court. The proceedings in which the injunctional order was issued were under the title of consolidated actions of *The Farmers Loan & Trust Company, Trustee, and the United Water Works Company, Limited,* v. *The New England Water Works Company, The Alton Water Works Company et al.*—one a bill for foreclosure of a mortgage and the other a creditor's bill—upon which decree had theretofore been entered, which is the same decree appealed from in

*New England Water Works Co.* v. *Farmers' Loan & Trust Co.* (136 Fed., 521), and affirmed by this court; and the general nature of the bills and decree are sufficiently described in the opinion there filed and reported.

Upon the coming in of the Master's report of sale under that decree, objections to confirmation of the sale were interposed by one Allen A. Brown and other persons, as individual bondholders under a trust deed, made by Boston Water & Light Co. (a defendant in such decree) to the International Trust Co., trustee (also a defendant therein), setting up, among other grounds, that they were not made parties to such suits, had no notice thereof and were "being deprived of their property without notice and without due process of law"; also that the purchase price was grossly inadequate. The plaintiff in error appeared for and represented these bondholders in opposing the confirmation.

On May 5, 1905, the court entered an order or decree of confirmation of the sale, as reported, to Samuel L. Peck, G. R. Leighton, Charles G. Sanford and Russell Frost, a committee representing bondholders, for the price named. The order recites, among other matters, that the purchaser moved to strike out the objections filed by Brown and others, and then orders, "that the said objections and exceptions of the said Allen A. Brown and others be and the same are hereby overruled and held for naught," and that the sale is thereupon confirmed; and the following is the concluding provision:

"And it is further ordered, adjudged and decreed that upon the completion of the payment of the pur-

chase price by the said purchasers, the delivery to them of the deed of the said Master and the delivery of the property to them by the said receiver, that the title to the said property and assets as against each and every party to this action, and all persons claiming, or to claim under them, or either of them, be vested absolutely in the said purchasers and their assigns, and all parties to this suit, and all persons claiming, or to claim by, through or under them, be and they and their and each of their attorneys, solicitors, officers and agents, are forever prohibited and enjoined from setting up any pretended or alleged title, as against the title of the said purchasers acquired by means of said Master's deed in this decree mentioned, and which said pretended, or alleged title may have arisen, by, through, or under any of the said parties to the said cause, and from in any way interfering with or disturbing the said purchasers, or their assigns, in the full and free use and occupation and enjoyment of all the said property so acquired by said purchasers by means of said sale and said deed from the said Master.

"It is further ordered, adjudged and decreed that the said purchasers have leave at the foot of this decree to apply for further directions and for any amendment thereof until the last day of the next term of this court, and for that purpose this cause will, upon adjournment of the present term of this court, stand continued upon the docket of this court until the last day of the next term thereof."

The objecting bondholders then made application to Mr. Justice Day of the Supreme Court for an

allowance of an appeal to that court, but the appeal was disallowed with a letter addressed to the plaintiff in error, which is made a part of the record, stating in effect that the bondholders were not named as parties, so that they were not entitled to a review on appeal, remarking that "their rights, if invaded, must in my opinion be worked out in an original proceeding."

Subsequently, Brown and other bondholders filed a bill in the Circuit Court of Madison County against the Boston Water & Light Company and other defendants, including the purchasers under the foreclosure decree above mentioned, for foreclosure of their alleged mortgage, and the plaintiff in error appeared therein as solicitor for the complainants. Thereupon the purchasers under the foreclosure decree petitioned for a rule, to be entered by the Circuit Court of the United States, upon the plaintiff in error, to show cause why he should not be punished for contempt of court for filing such bill and issuing summons thereupon, in alleged violation of the injunction of that court. The petition was entertained by the court, under the title of the original consolidated suits, upon an order "that said causes be redocketed for the purposes of said petition" and that a citation issue thereupon.

The plaintiff in error submitted his sworn answer to such rule, disclaiming "any intention on his part to violate any lawful orders or decrees entered by" the court, and stating that he represented Brown and other bondholders, as their duly authorized attorney; and having applied for an appeal to

the Supreme Court, which was denied with an opinion by Mr. Justice Day which is annexed to the answer, he so proceeded in behalf of such bondholders, believing that they were neither parties to nor affected by the decree of this court and were entitled to so proceed. The court on April 16 entered the order appealed from, which reads (after the title) as follows:

"In the matter of the petition of Samuel Peck, G. Ralph Leighton, Charles G. Sanford and Russell Frost for a rule against James Hamilton Lewis to show cause why he should not be punished for a contempt of court in violating the injunction contained in the decree made and entered in the above entitled consolidated cause on the 5th day of May, A. D. 1905.

"The above entitled matter coming on to be further heard and the court being now fully advised finds that the said James Hamilton Lewis did file in the Circuit Court of Madison County, Illinois, a certain bill wherein Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, James Schouler, C. A. Damon, Joseph C. Foster, Chas. N. Page, George W. Fairbank, M. C. Grier, Sabra Hodgkins, Wm. B. Trask and Mary A. Evans are complainants and Boston Water and Light Company, a corporation, International Trust Company, a corporation, Alton Water Works Company, a corporation, George W. Sumner, and Chester B. Sumner, executors of the estate of Wm. H. Sumner, James Howe, Orin Warren, Alice G. Page, John Farquhar, administrator of estate of Benjamin F. Dudley, deceased, George F. Lovett, Vernon Prouty, Frank

Dromgoole, The C. H. Venner Co., a corporation, Cidele Venner, Samuel Peck, G. Ralph Leighton, Charles G. Sanford, Russell Frost and unknown parties claiming an interest in the property described in the said bill, are defendants, praying for the foreclosure of a certain mortgage executed October 1, 1897, by the Boston Water and Light Company of the State of Maine to the International Trust Company of the State of Massachusetts, to secure the payment of 200 bonds bearing same date for $1,000 each. The court further finds that said action is in violation of the injunction order of the Circuit Court of the United States entered May 5, 1905. It is therefore ordered that said James Hamilton Lewis be and is hereby held to be in contempt of this court and is sentenced to be imprisoned in the Sangamon County, Illinois, jail for sixty days or until further order of this court. In case the above described cause now pending in the Circuit Court of Madison County, Illinois, is dismissed within five days from this date said sentence of imprisonment is to be suspended."

On April 17, under compulsion of such order, the plaintiff in error dismissed the suit so commenced in Madison County Circuit Court, and advised the Circuit Court of the United States of such dismissal, pursuant to and under the compulsion of such order, to save himself from the imprisonment thus imposed.

For jurisdiction to enter the injunctional order contained in the order or decree of confirmation, paragraphs twenty-two, twenty-five, twenty-six and twenty-seven of the original decree are relied upon.

Paragraph twenty-two provides that the purchaser thereunder, after delivery of the premises and property, "shall hold possession and enjoy the same with all rights, privileges, immunities and franchises pertaining thereto as fully as said Alton Water Works Company, The New England Water Works Company and Boston Water and Light Company, or the receiver therein, now hold or enjoy the same at any time heretofore; and shall hold the same, or held or enjoyed, or were entitled to hold or enjoy the same free and discharged" from the lien or incumbrance of all the mortgage trust deeds in this decree mentioned and free from all claim or claims of every kind and nature of all parties to this cause and those claiming under them.

The other paragraphs read as follows:

25. "All questions not hereby disposed of, including the settlement of the accounts of the receiver and his discharge and the amounts to be allowed said receiver and his counsel, and the amounts to be allowed said trustee, complainants and their solicitors, and the amount to be allowed the Master, and the application of moneys in the hands of the receiver to bonds and coupons or upon allowances and costs, are hereby reserved for future adjudication, and any party interested in such reserved questions may at any time, either before or after sale, apply to this court at the foot of this decree, for further relief in respect thereto."

26. "Any party interested in the questions hereinbefore reserved concerning coupons and interest (referring to claims of C. H. Venner Co. reserved

in Par. 16, not in question), may at any time apply to this court at the foot of this decree for further relief in respect thereto."

27. "Jurisdiction of this cause is retained in this court for the purpose of determining all such reserved questions and of enforcing the conditions of this decree and of any further order made herein, and any party to this proceeding may apply to the court for further orders and directions at the foot of this decree."

SEAMAN, CIRCUIT JUDGE, DELIVERED THE OPINION OF THE COURT.

The ultimate facts involved in this review are simple, however serious their import in the administration of equity powers and duties, and their effect in the commitment of the plaintiff in error for contempt. The propositions of law upon the general powers of the trial court to restrain the prosecution of cognate suits in other courts, and in reference to the rights and privileges of counsel in actions so brought—which are presented in one of the aspects of this adjudication and discussed in the arguments—are not free from difficulty under the authorities. It is not needful, however, to decide either of these important general questions, unless the validity of the commitment rests upon their solution.

The injunctional order of which violation is adjudged, was not contained in the express terms of the foreclosure decree, which was entered in 1903 (and affirmed upon appeal to this court), but was made a part of the order or decree entered May 5,

1905, confirming the sale made April 18, 1905, as reported to the court under the decree of 1903. Primarily, therefore, jurisdiction must appear for making, in that proceeding and at that stage, an order which became operative as a personal injunction against the individual bondholders and their special counsel, applicable to the alleged violation by the plaintiff in error, to uphold the commitment. Neither the bondholders nor the plaintiff in error were named as parties to the decree or subsequent order; nor cited in or recognized as parties of record. True, the trustee named in the trust deed securing the bonds in controversy, was a party; and the general rule under such instrument and relation is firmly established, that the trustee represents the bondholders in such foreclosure proceedings involving interests under the trust deed, and that his presence is sufficient to bind the rights and interests of bondholders, who are thus constructively served and present. In the foreclosure proceedings thereupon, it may well be assumed, that the court possessed ample power to make all needful orders or provisions, interlocutory or final, not only to foreclose interests which are represented, but to protest the *res* and interests involved in the litigation for complete administration.

The plaintiff in error, as attorney for several holders of bonds secured by one of the trust deeds involved in and foreclosed under the above mentioned final decree of the Federal court, filed a bill in one of the State courts, on behalf of such bondholders, wherein an independent foreclosure was sought under the trust deed, in despite of the prior

decree and sale, with the purchasers thereunder named as defendants among other parties. This suit was instituted in March, 1906, when the federal proceedings were closed, with all issues therein settled, sale confirmed and the purchasers in possession. The question whether the action was well-advised or seemly, in any view, is beside the inquiry of contempt in thus attempting another foreclosure, which rests alone on the validity and interpretation of the injunctional order entered in the Federal court on May 5, 1905.

When that order was made, the matters before the trial court, as disclosed by the record, were the report of the Master upon the foreclosure sale made under the decree and of the proceeds arising therefrom, together with the objections filed to confirmation of such sale. The issues were: Shall the sale be confirmed, with direction to convey and deliver possession to the purchasers, and distribute the proceeds in conformity with the decree? or, Shall the sale be set aside, and re-sale or other procedure ordered? Provisions for either course were plainly within the power of the court, and its conclusions and order in conformity with the first mentioned course are not open to question here. The further order, however, which is challenged is a provision, not only vesting title in the purchasers "as against each and every party" to the action and "all persons claiming, or to claim under them," but that all parties and persons "claiming or to claim by, through or under" either party, and their attorneys and agents, "are forever prohibited and enjoined from setting up any pretended, or alleged, title as against

the title of the said purchasers," and "from in any way interfering with or disturbing the said purchasers, or their assigns, in the full and free use and occupation and enjoyment of all the said property so acquired." Passing the contentions on behalf of the plaintiff in error, that these terms are not applicable to the individual bondholders and are not violated by the orderly commencement of an independent suit by bondholders, not made parties, we assume the premise for testing the validity of the injunction, that its scope was sufficient to include such suit, as the commitment for contempt rests wholly upon that purpose and interpretation.

The final decree therefore entered (1903) was complete and binding upon all parties for the intended foreclosure, and for definition of the title which would be conveyed to the purchaser of the *res* upon sale, together with provisions for and terms of conveyance and possession. Except for the last mentioned purposes of sale and conveyance, and the questions and objects reserved in the concluding paragraphs (25, 26, 27), the controversy was closed, and no further relief was open in the suit. To carry forward these specific purposes and determine the reserved questions, orders and directions were authorized at the foot of the decree, but jurisdiction was not retained beyond those which were so specified, all executory in their nature.

The sole reliance for support of the injunctional order in the terms of the decree is in the expression of paragraph 27, which includes "enforcing the conditions of this decree" as thus reserved. Various provisions of the decree are stated in the form of

conditions, and plainly within this reservation. Thus foreclosure sale is conditioned upon the failure of the defendants to pay the sums adjudged due within the time specified; and when sale occurs, it is made subject to conditions, both of performance by the purchaser and approval by the court, with provision for re-sale in the event of disapproval or non performance. The terms or recitals which define the interests and title passing to the purchaser upon sale are in no sense "conditions of the decree" which can be enforced by subsequent orders, otherwise than by the conveyances and delivery of possession as directed. To that end, it cannot be doubted that needful orders were authorized, injunctional or otherwise, to preserve the integrity of the property and subject-matter in the hands of the court, from interference or disturbance in any manner, to complete the performance of such conveyance and delivery. No remedy, however, not within the contemplation of the foreclosure decree was thus left open to be administered at its foot. The purchaser acquired under the sale and conveyance all the title and interests of parties which the decree was competent to confer. With no obstacle in the way of the conveyance and possession, can the jurisdiction so retained, extend to injunctional relief in favor of the purchasers (not parties in any sense until approved as purchasers), to reach these dissatisfied bondholders individually (not parties of record), to enjoin them from suing upon the bonds?

The right of the purchaser or his successor in interest to invoke the jurisdiction of the trial court, by supplemental bill in the action, against a dis-

turber of title and possession so acquired, in derogation of the decree of foreclosure, is expressly upheld in *Julian* v. *Central Trust Co.*, 193 U. S., 93, 109, so that the exercise of jurisdiction to prevent actual interference is unquestionable, when the parties are before the court under issues duly made. No authority is brought to our attention, which sanctions either (1) supplementary injunctional orders of the present nature, without personal service and issue raised upon the infringement, or (2) enjoining the mere commencement of suits in a State court, with no disturbance of possession, unless within the exception named in Section 720 U. S. R. S. And we are of opinion that the order in question, in so far, at least, as it was treated as operative against the filing of bills on behalf of individual bondholders, was not within the limited jurisdiction reserved in the trial court.

The doctrine is well established, that the right of a court of equity to decide all questions arising in the case, when jurisdiction is once acquired, is subject to important limitations; that it extends only to controversies which arise and are submitted by proper proceedings between adverse parties. As stated in *Windsor* v. *McVeigh*, 93 U. S., 274, 282:

> "All courts, even the highest, are more or less limited in their jurisdiction. * * * Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by the law. * * * So a departure from established

> modes of procedure will often render the judgment void. * * * The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way."

When a court transcends the limits of its authority in a given case, its orders are void, not merely erroneous. *Ibid.*

In the proceedings of May 5, 1905, the sole questions before the court, as before stated, were the action to be taken in reference to the sale as reported, and disposition of the proceeds. No individual holders of bonds were cited or called in to answer any application for the injunctional order; nor does it appear that application was made for it. It is true that certain of the bondholders objected to confirmation of the sale; and written specifications were filed on their behalf, by the plaintiff in error, as "appearing separately for bondholders to object to confirmation"; but upon the hearing, it was ordered, that "the said objections and exceptions" be and they were "overruled and held for naught." These objectors were there for no other purpose, and were out of the proceeding when their objections were overruled; and no conduct appears upon the part of either to authorize the exercise of jurisdiction *in personam* over the plaintiff in error or his clients to restrain them from setting up or suing upon their supposed independent claims, however groundless such claims may appear when brought to hearing.

The contention in support of the order and its ap-

plication to the suit commenced by the plaintiff in error, is twofold and substantially this: That the order was valid against the trustee, who represented the bonds in controversy, and was a party to the proceedings, and was thus authorized and made binding as a personal injunction against each of the bondholders so represented. We are not satisfied that the premise is sound, of right to enjoin the trustee, but however that may be, we are satisfied that the injunction was inoperative as against the proceeding in question on the part of the bondholders.

The property and subject matter of the decree were neither molested, nor threatened with disturbance in the hands of the court or pending administration, so that no need appears for an injunction to preserve the status. If suit were commenced upon the bonds, either in that court or elsewhere, no deprivation of rights which were lawfully conferred by the prior decree of the Federal court could have judicial sanction, as the application for and grant of a restraining order necessarily assumes to justify the restraint. The mere institution of suit in such case does not disturb the prior jurisdiction or adjudication in any decree. As said by Judge Grosscup, speaking for this court, in *Copeland* v. *Bruning* (127 Fed., 550, 552), in reference to like contention that a suit in the State court "challenged the decree of the Federal court"; "Let this be admitted; even then the injunction is not justified, for to the extent that the subject matter of the suit in the State court was already settled by former adjudication, the defense should have been by plea in

the court when the suit was brought, and not by injunction in another jurisdiction. No possession of the *res* was involved, and no conflict of courts could have followed, that would have affected the decree in the United States Court." Again, in *Royal Trust Co.* v. *Washburn B. & I. R. R. Co.* (139 Fed., 865, 867): "The point at which interference with the possession of the Federal court begins, is not the invoking in the State court of its power in that respect, but the attempt to exercise such power, to the extent that the exercise of such power would interfere, actually and physically, with the possession of the property by the United States Court." In the case cited, an adjudication of the Federal court committing attorneys for contempt of that court, was reversed, although they had applied for and obtained an injunction in a State court, against the execution by officers of the Federal court, of the final decree of such court, and had delivered the restraining order to the Sheriff for enforcement. While commitment of the Sheriff was upheld for actual invasion and interference, the attorneys were held not guilty, as their procedure was not an invasion of the Federal jurisdiction. Section 720 U. S. R. S., expressly prohibits an injunction "to stay proceedings in any court of a state," except as authorized in bankruptcy; and while this provision is not applicable when the jurisdiction of the Federal court is disturbed thereunder by actual invasions (*Julian* v. *Central Trust Co., supra*), it may rightly be applicable to deny injunctional relief against orderly proceedings in any court, even by parties, without such invasion. *Guaranty Trust*

*Co.* v. *North Chicago St. R. Co.*, 130 Fed., 801, 805; 65 C. C. A., 65. The court may exercise ancillary jurisdiction, as in the *Julian* case, when properly invoked on behalf of the purchaser under the decree, to prevent invasion of rights which were adjudicated and vested in such purchaser; but we do not understand that sanction appears in any of the authorities, either for warranty of title or possession upon judicial sale or for an injunctional order to prevent future litigation against the purchaser, beyond the saving effect of the decree. Under the doctrine of *caveat emptor*, which is strictly applicable to all judicial sales (*The Monte Allegre*, 9 Wheat., 616, 645; Rorer on Judicial Sales, Secs. 174, 475, 476, 528), authority for such provision in the order may well be doubted, even as against the trustee.

Laying aside, however, the question whether such injunction can be granted as against parties who are personally served, the plaintiff in error and bondholders represented by him, were not parties in any sense which would authorize jurisdiction over their persons, to make such order binding upon them. Assuming that the foreclosure suit and decree bound the holders of all bonds, through the substituted service upon the trustee, it was thus effectual only as a proceeding *in rem* and to the extent of their interest in the *res*, and authorized no procedure or relief *in personam* against the individual bondholders, constructively bound by such decree. *Pennoyer* v. *Neff*, 95 U. S., 714, 727; 9 Notes U. S. Rep., 339. So, if the injunctional order were germane, authorized and operative, as against the

trustee, it was not operative against the individual bondholders, who were not served and not subject to jurisdiction *in personam*. *Hawley* v. *Fairbanks*, 108 U. S., 543, 551; *Parsons* v. *Greenville, etc., R. Co.* (per Mr. Chief Justice Waite); 1 Hughes, 279; Fed. Cas., No. 10776; *In re Reese*, 98 Fed., 984, 986; *Fellows* v. *Fellows*, 4 Johns. Ch., 25. Whatever the interests or rights of the bondholders may be under the terms of the trust deed—whether within the general rule and thus fully represented and foreclosed by the presence of the trustee, or exceptional as they contend—they are bound by the decree only to the extent authorized by the trust deed in such representation. If they have claims of independent right, not so represented, as they contend, they are neither within the terms of the order, as claimants under the trustee, nor subject to the jurisdiction of the trial court for any form of injunction against their exercise of independent right to sue upon such claim.

While the trust deed was before the trial court, as part of the subject matter in the foreclosure suit, and (presumptively) construed otherwise in entering the final decree, the bondholders were not personally served and their contention was not heard in such interpretation and entry. Whatever be their actual right, or the effect to be given that adjudication, they cannot be restrained in that proceeding—to say the least, without personal service upon them—through any injunction against the trustee, from the common right of suit upon their alleged independent claim, which arises under their grantor, not under the trustee. If *res judicata*, or otherwise

without merit, such determination, in the first instance at least, is for the forum in which such suit is brought, and the court of prior jurisdiction of the subject matter cannot, as we believe, enjoin such procedure in another court of co-ordinate jurisdiction; nor can it rightly be assumed by any court, in thus directing conveyance to a purchaser under its decree, that co-ordinate judicial tribunals would disregard such decree or fail to give it due effect when so involved in subsequent litigation.

We are of opinion, therefore, that the injunctional order in question was without force against the individual bondholders or their attorney, and that the plaintiff in error was not guilty of contempt in his proceedings in the State court.

GROSSCUP, CIRCUIT JUDGE, DISSENTING.

Though the facts are fully and accurately stated in the opinion of the court, I shall summarize such of them, in their logical order, as are necessary to bring out the view upon which this dissent is founded.

The original bill was not the ordinary and usual bill for foreclosure, nor was the decree the ordinary and usual decree foreclosing a mortgage. The bill brought to the attention of the court the fact that certain property claimed by the New England Water Company as its own, free from the Farmers' Loan and Trust Company mortgage, and mortgaged by the New England Company as unencumbered property to the International Trust Company, was not in fact property free from the Farmers' Loan

and Trust Company mortgage, but was property subject to the Farmers' Loan and Trust Company mortgage as after acquired property; and had not in fact been mortgaged unencumbered to the International Trust Company, but was not subject to that mortgage in any respect; and upon issues made upon these contested questions (the New England Water Company and the International Trust Company being in court for themselves and those who claimed under them) the decree of foreclosure, as a basis on which to foreclose the Farmers' Loan and Trust Company mortgage, judicially determined that the property in dispute was subject to the Farmers' Loan and Trust Company mortgage, and that, at the sale decreed, the purchaser should take the same free and discharged from the lien or encumbrance of the alleged mortgage by the New England Company to the International Trust Company in the decree mentioned, and free from all claim or claims, of every kind and nature, of all parties to the cause, and those claiming under them; jurisdiction being retained for the purpose of "enforcing the conditions of this decree, and of any further order made herein."

Under the decree thus entered—a decree judicially determining the legal status of the property in dispute—all the property, including the property in dispute, was offered for sale, under a provision that a committee of bondholders represented by the Farmers' Loan and Trust Company might bid; and, should they become the purchasers, might pay for the same, by turning in cash sufficient to dis-

charge a previous mortgage in which they were not interested, and by paying in cash to the bondholders not represented by the committee, their proportion of the purchase price, together with costs of suit—the bonds of those represented by the committee to be turned in for the balance; under which provisions —all of them provisions in the decree—the committee made the highest and best bid for the property.

When this sale came to the court for confirmation, the appellant appeared and filed objections as counsel for bondholders claiming under the International Trust Company's mortgage (he had also been counsel throughout the preceding litigation) on various grounds, including one that the selling price was too small, but chiefly on the ground that the individual bondholders whom he now appeared for, not having been parties, in name at least, to the previous proceedings, were not bound by the decree, and still retained, notwithstanding the decree, a lien or claim upon the property in dispute.

The filing of these objections put the posture of affairs thus: The court had a bid, based upon a decree that the purchaser was to obtain the property in dispute free and clear from the claim of the International Trust Company, and those claiming under it (meaning of course these individual bondholders); a bid that required that large sums in cash should be paid to a previous mortgagee and to bondholders not represented. But the individual bondholders claiming under the International Trust Company were now in court insisting, that as against them, notwithstanding the clear terms of the decree, the purchaser should obtain no such free

and unencumbered title. So the practical question before the court was: Are these individual bondholders foreclosed by that decree, as to this disputed property, or are they not; for if foreclosed, the court could give title free and clear of encumbrance according to the provisions of the decree; while if not, the purchasers were not obtaining the title free and clear of encumbrance that they had a right, from the decree to expect. The question was a practical question and a pressing one—one on which the court ought to have power to take a practical and effective course.

Unquestionably, to my mind, the court in overruling these objections, determined—was bound to determine—that the individual bondholders *were* bound by the original decree, and that the purchaser *would* take the property free from their claims. There is no other reason or logic in the ruling. And unquestionably too, the injunctional order included in the decree of confirmation was intended by the court as a method of protecting the purchaser against the disregard, by the individual objecting bondholders and their counsel, of this ruling—a step taken by the court to secure to the purchaser the kind of title that the court in the original decree had offered to the purchaser. Now was the court without power to put that ruling into practical effect?

The opinion from which I dissent does not hold that the court had no power, in its original decree, to order the property sold, free and clear from the claim of the International Trust Company and those claiming under it; nor that the individual stock-

holders, whose counsel appellant was, are not parties claiming under the International Trust Company, and for that reason not bound by that portion of the decree. On the contrary it proceeds on the assumption that in the original decree the court had such power; and that these individual bondholders are thus bound.

Nor does the opinion from which I dissent hold, that supplemental to the foregoing power the court would not have had the power, in the original decree, to enter an injunctional order restraining the International Trust Company, and those claiming under them, and their attorneys, from setting up any pretended title against the title of the purchasers acquired under the court's deed. On the contrary, respecting that question, the opinion says: "The propositions of law upon the general powers of the trial court to restrain the prosecution of cognate suits in other courts, and in reference to the rights and privileges of counsel in actions so brought—which are presented in one of the aspects of this adjudication and discussed in the arguments —are not free from difficulty under the authorities. It is not needful, however, to decide either of these important general questions, unless the validity of the commitment rests upon their solution."

And further on the opinion proceeds: "In the foreclosure proceeding, therefore, it may well be assumed that the court possessed ample power to make all needful orders or provisions interlocutory or final, not only to foreclose interests which are represented, but to protect the *res* and interests in-

volved in the litigation for complete administration."

The opinion from which I dissent does not show, specifically at least, that the injunctional order subsequently entered was not known to the individual bondholders or appellant, before the acts constituting the contempt were committed; though it does state that neither the bondholders nor the plaintiff in error were *named* as parties to the injunctional order, nor cited in, nor recognized as parties of record. But this last statement ignores the fact fully stated elsewhere in the opinion that the injunctional order was entered as a part of the order overruling the objections filed by appellant in behalf of these individual bondholders, and presumptively, therefore, did not escape his notice.

The opinion from which I dissent, puts forth no pretension that if the injunctional order were within the power of the court to enter, appellant can defend against the contempt proceedings on the ground, either that the proposition of law on which it was founded was erroneous; or that the proceedings were defective or irregular; or that on review on appeal, or in error, the court for any reason other than that of *want of power* should have vacated the order. And I take it, it is too well settled for further discussion, that a party charged with contempt may not procure a review of the injunctional order entered on any ground other than want of power of the court to enter it—may not obtain a general review by simply defying it.

Assuming, then, that the court, in its original de-

cree of foreclosure, had power to enter the injunctional order (as assumed though not decided in the opinion from which I am dissenting; but decided I think in *Julian* v. *Central Trust Company*, 193 U. S., 93), the opinion proceeds to find that the court was without power to enter the order, in the *subsequent confirmatory decree*, for the following reasons as I understand them: (a) That such an order was not within the reservation contained in the original decree; (b) that such an order was not within the issues presented to the court on the confirmatory decree; and (c) that the individual bondholders, and the plaintiff in error, were not in court at the time the injunctional order was entered, upon any issue that could eventuate in such an injunction.

I take up these reasons in the order stated. First then as to the reservation in the original decree. The original decree reserves full power of "enforcing the conditions of this decree, and of any further order made herein." Why is not that broad enough to include the condition that the purchaser, at the foreclosure sale, should take title, free and clear of the claims of the International Trust Company and those claiming under them? Indeed, the proviso just named, was one of the main conditions of the decree. Upon it rested the practical question of what amount the property would sell for, or whether the property could be sold at all. To clear up that condition, the main litigation was fought out—there was no other substantial issue in the case; so that to say now that the court, in entering its original decree, did not intend to reserve power, to the extent if necessary of all the power it possessed, to

enforce that condition of the decree, by any order that it might subsequently enter, is to say that the court kept its eyes and its decree open to the smaller contingencies that might transpire, but closed both its decree and its eyes to the single great contingency that might intervene to defeat the court's purpose; and the court's power to carry out that purpose.

Assuming then that the injunctional order was within the reservations contained in the original decree, is there anything in the proposition that it was not within the issues presented to the court on the confirmatory decree, or that appellant was not in court on that order? The individual bondholders represented by appellant, and appellant himself, were, in fact, as we have seen, in court at the time the confirmatory decree, carrying along with it this injunction, was entered. The contention of the individual bondholders that they were not bound by the original decree was necessarily before the court, as already stated, when the confirmative decree was entered. The practical question raised by their objections was, whether these individual bondholders were so bound; and though the matters thus brought before the court by appellant on behalf of the individual bondholders did not, perhaps, take the ordinary and usual form of pleadings calculated to present issues, they did present substantial actual issues, upon the consideration of which the court must have predicated its judgment that the injunctional order should be entered. By what authority then, is the *regularity* of these proceedings now challenged? Appellant has not brought the injunc-

tional order to this court on review or appeal, as he might have done; he has simply defied it. By what authority does he obtain a review as if, instead of defying, he had in the ordinary course of procedure appealed from it? True, as already stated, the record does not disclose a petition or other pleading formally asking them to show cause why the injunctional order should not be entered, and bringing them into court for that purpose; but being in court for any of the purposes of the case, I take it as fundamental that they were in court for all the purposes of the case; and that unless dismissed out of court, they are bound by every prohibition laid upon them, respecting the subject-matter of the litigation that the court had power to lay upon them, unless, and until, it was set aside in the regular course of appeal. To hold otherwise would be to hold, as already stated, that one enjoined from doing a particular act—one not only notified of the injunction, but a party to the order in which the injunction is entered—can procure a review of the regularity of the proceedings in which it is entered by simply defying it.

The injunctional order entered is an unusual one. But the case in some respects is unusual. The practical consideration behind the court's determination of the status of the disputed property—whether it should be sold free and clear of the claim of the International Trust Company and those claiming under it, or not—was not merely that the parties might know what, in law, was the status of the disputed property. The practical consideration, behind that portion of the decree, was that the court might

obtain the highest price that the property would command, by selling it, *in fact*, free and clear of such encumbrances. And to secure such a sale, to make good its assurance that the property would go to the purchaser free and clear of the claims adjudicated, the court had power, in my judgment, at any stage in its proceedings, by giving proper notice to the parties bound by the decree, to lay its mandate of prohibition against their doing anything that would defeat the decree. Indeed, to say now to the purchaser, that it was not a water plant, free and clear of all the claims litigated and determined that he was buying, but a water plant encumbered by a renewed lawsuit, that might be carried on in any of the courts of the country, seems to me to be flying in the face of the very conservative, but the very just and healthful, course taken in *Julian* v. *The Central Trust Company, supra.*

The judgment of the Circuit Court is reversed, with direction to dismiss the petition and discharge the plaintiff in error.

## APPENDIX "B."

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.
October Term, 1907.

No. 1468. April Session, 1908.

The Alton Water Company, *Appellant,*
*vs.*
Allen A. Brown, Trustee, Robert B. Wason, Harriet N. Houghton, Jas. Schoulder, C. A. Dimon, Joseph C. Foster, *et al.,* *Appellees.*

Appeal from the Circuit Court of the United States for the Southern District of Illinois, Southern Division.

BEFORE GROSSCUP, BAKER AND SEAMAN,
CIRCUIT JUDGES.

This appeal is from a final decree dismissing the bill of complaint, filed by the appellant in the trial court, as an ancillary bill under foreclosure proceedings and creditors' bill theretofore pending in such court, wherein sale of mortgaged property had been decreed and such sale made to the appellant's grantor of title therein, and confirmed by the court. The relief sought by the ancillary bill was to clear an alleged cloud cast upon the title by the appellees, asserting claim as bondholders under one of the

mortgages so foreclosed, and to enjoin their prosecution of a suit commenced in the Circuit Court of Madison County, for foreclosure of their alleged mortgage claim upon the property in question, notwithstanding such primary proceedings in the trial court. The facts averred are the same which were brought to this court for review, in an appeal entitled *New England Water Works Co.* v. *Farmers' Loan and Trust Co.*, 136 Fed., 521, together with the facts appearing in the subsequent writ of error, entitled *Lewis* v. *Peck*, 154 Fed., 273, in reference to the sale under such foreclosure decree, confirmation thereof, and conveyance of the mortgaged property; and include further averments of proceedings commenced by the appellees, in the State court, notwithstanding such prior decrees and conveyance thereunder, to foreclose the mortgage in question, and have a receiver appointed to take possession of the property—thus attempting to "relitigate the questions of right concerning said property which had been fully litigated and settled" under such prior decrees, and "render ineffectual the said decree" and "depreciate the title acquired thereunder."

The ancillary bill, therefore, predicates the claim to relief against the appellees on the same state of facts involved in the above mentioned case of *Lewis* v. *Peck* (as stated in connection with the opinion therein), with the further averment that another foreclosure suit has been brought by these appellees, representing like interests under the same mortgage of which foreclosure was thus sought on

behalf of the bondholders, upon like claim that they were not served with process or bound by the prior decree of foreclosure in the trial court.

General and special demurrers to the bill were interposed by the appellees, with special causes stated: (1) for want of jurisdiction "over the subject matter and parties to the suit," and (2) as not an ancillary bill, because the appellees were not parties to the original proceedings referred to.

Motion was made by the appellant for a preliminary injunction and such motion set down for hearing, together with the demurrers; and thereupon the decree appealed from was entered, (1) denying the injunction, (2) sustaining the demurrers, and (3) dismissing the bill of complaint "for want of jurisdiction."

SEAMAN, CIRCUIT JUDGE, DELIVERED THE OPINION OF THE COURT.

The jurisdiction of this court to entertain the appeal from the decree of the Circuit Court, is challenged by motion on behalf of the appellees for dismissal, upon the twofold proposition: That the jurisdiction of the trial court was in issue under each of the special causes assigned for demurrer to the bill, and that the decree appealed from expressly sustains such causes, by the terms of the decree dismissing the bill "for want of jurisdiction." As the Judiciary Act of 1891, organizing the Circuit Courts of Appeals (26 Stat. 826, 1 U. S. Comp. St. p. 547), provides in Section 5, for appeal direct from the Circuit Court to the Supreme Court, "in

any case in which the jurisdiction of the court is in issue," and by Section 6, cases thus made reviewable by the Supreme Court on direct appeal or writ of error from the trial court, are excepted from the appellate jurisdiction conferred upon the Circuit Court of Appeals, it is plain that this appeal is not entertainable, if the jurisdictional objections thus raised by demurrer and upheld by the trial court, are within the meaning of the above mentioned provision of Section 5, for immediate review by the Supreme Court. See opinion of this court in *Crawford* v. *McCarthy,* 148 Fed., 198, 200.

In appeals and writs of error under this organic enactment, the decisions have been numerous in construing the provision referred to; and that the opinions were not entirely harmonious in its interpretation, appears not only from the citations for and against the present motion, but from the initial lines of ruling in the various circuits. The difficulty arose out of the general terms of the provision for cases "in which the jurisdiction of the court is in issue," to ascertain the statutory purpose in reference to the numerous objections raised, in trials at law and in equity, for alleged "want of jurisdiction." We are of opinion, however, that the interpretation is settled in the line of recent decisions by the Supreme Court, cited in *Crawford* v. *McCarthy, supra,* and that other authorities which are relied upon for dismissal of this appeal are inapplicable to that end. The statutory meaning thus established for the jurisdictional issue which governs the right of appeal, limits its application (1) "to cases where the jurisdiction of the Federal

court, as a Federal court, is put in issue''—excluding from its scope "questions of jurisdiction applicable to the State courts, as well as to the Federal courts'' (*Board of Trade* v. *Hammond Elevator Co.*, 198 U. S., 424, 432, and *Courtney* v. *Pradt*, 196 U. S., 89, 91, with cases reviewed)—and (2) to an issue raised, whether jurisdiction of the defendant was ever obtained by proper process (*Board of Trade* v. *Hammond Elevator Co., id.*); so, without one or the other of these well defined jurisdictional issues raised by the demurrer and decided in the decree, the case is reviewable by this court.

That the demurrer raises no question of invalid service of process—no matter *de hors* the averments of the bill—goes without saying. That it raises questions of equitable jurisdiction over the matters stated in the bill—both under the general and the special demurrers—may well be conceded. We do not understand, however, that the jurisdiction of the trial court, as a Federal court, is expressly challenged by either demurrer; nor that any issue is raised thereby which would not be applicable alike were the bill filed in any court of equitable jurisdiction, state or federal.

The alleged special causes of demurrer are relied upon for support of the present motion; but neither of the two grounds referred to specifies an issue distinctively federal, nor purports to put in issue the jurisdiction of the court under its federal limitations alone. Each, therefore, is plainly distinguishable from the several causes of demurrer so stated in *Crawford* v. *McCarthy*, *supra*, and not within the rule referred to which was there applied. The first

special ground stated for the instant demurrer, is want of jurisdiction "both over the subject matter and parties to the suit"; and its utmost possible force is to raise one or both of these jurisdictional issues; (a) whether the bill is in truth ancillary under the facts stated, or if not, (b) whether it can be upheld as an original bill. As the bill is presented alone as an ancillary bill, without the jurisdictional averments which are fundamental for its entertainment as an original bill, the only substantial issue thus raised, is the sufficiency of facts stated to establish ancillary jurisdiction. So, the second ground assigned merely tenders, in another form, like issue with the first, and each is a challenge only of the inherent chancery powers of the trial court over parties and subject matter. We believe such issue, in either form, to be reviewable here; that the demurrer raises no issue not cognizable on this appeal, and the motion to dismiss is overruled accordingly.

We are brought, therefore, to consideration of the sufficiency of the bill, to authorize the relief sought, as ancillary to the prior foreclosure proceedings and decrees in the trial court. The appellant is successor in interest to the purchase of the mortgaged property under such foreclosure decree, vested with the title and possession which was thus decreed, conveyed and confirmed; and the ancillary bill is filed on its behalf for protection in such title and possession, against interference with or relitigation of rights settled by the decrees referred to, on the part of the appellees, alleged to be parties to the prior litigation and decrees, either actual or

constructive. That the jurisdiction of a court of equity, Federal or State, is ample to protect and effectuate its decrees, standing unreversed, in favor of a purchaser thereunder, by ancillary proceedings against any party to the litigation who interferes with rights therein determined, is elementary doctrine (*Wabash Railroad* v. *Adelbert College*, 208 U. S., 38, 54, and cases cited); and it is well settled accordingly, that the original jurisdiction of the court over subject matter and parties, may thus be invoked and exercised, to ascertain the fact and extent of the jurisdiction which was there acquired for all purposes of the decree, and what questions of right were there settled, and to grant equitable relief for assurance and protection of such rights from interference by any person or interest bound by the decrees. *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S., 188, 195, and authorities there collated and reviewed.

This ancillary bill avers a state of facts, as we believe, within the rule above stated, for the exercise of such jurisdiction, to settle the controversy thus set up by these bondholders, that the decree was inoperative for foreclosure of their interests, for want of personal service upon them, although the trustee named in the mortgage (under which their rights are claimed) was served and participated as their representative throughout the litigation and such foreclosure is expressly decreed therein. The terms of the instruments (mortgage and bonds) and the property conveyed thereunder as security are the subject-matter (in part) of the litigation and final decree, with the effect of each of such terms in-

volved for decision; and the question of right so involved—whether the trustee as appointed became the representative of bondholders for all purposes of the decree, within the general rule well recognized in such foreclosures—was the fundamental inquiry to be determined for the decree as passed. Primary jurisdiction of the *res* appearing in the trial court, its authority to determine from the mortgages in suit, whether the actual presence of the bondholders, joined as individual parties with their trustee, was needful for the purposes of the final decree—and if so, to provide for bringing them in through proper process—is not only unquestionable, but exclusive, as well, pending complete adjudication. Moreover, the general rule is uniformly recognized in the federal authorities (*Beals* v. *Illinois, etc., R. R. Co.,* 133 U. S., 290, 295, and cases cited), that the presence of the trustee so named in the mortgage securing the bonds "is sufficient to bind the rights and interests of bondholders who are thus constructively served and present." (*Lewis* v. *Pecke, ante.*) The contention that this rule is inapplicable in Illinois, under a local statute—Sections 7 and 43 of the Chancery Act, Starr & Cur. Ann. St., 2 Ed., pp. 560, 590, quoted in *Chandler* v. *Ward,* 188 Ill., 322—and line of decisions thereunder which are thereby assumed to set the rule aside in that jurisdiction, we believe to be untenable; and for the purposes of this inquiry, lay out of view the objection raised that the statute referred to, however interpreted, cannot govern chancery procedure in the Federal court. That statute merely provides: (Sec. 7) in reference to "suits in chancery and suits to obtain the title to

lands," in any court of the state, wherein persons are interested whose names are unknown, that they may be made parties under the "description of unknown owners," and "notices given by publication," and that (Sec. 43) decrees thereupon shall bind such persons as though sued in their proper names; and the cases cited apply such provision to the common forms of trust deed employed in Illinois by way of mortgage security upon real estate for indebtedness to the *cestui que trust*—generally securing a note holder, but instances appear of an issue of notes or bonds so secured—and require such *cestui que trust* parties to be joined thereunder (as "unknown owners" where such fact appears) in suits to foreclose or affect their interest. *Vide Clark* v. *Manning*, 95 Ill., 580, and *Chandler* v. *Ward*, 188 Ill., 322. Neither the terms of this statutory provision (which is common in other jurisdictions) nor the line of cases referred to can be held applicable to set aside the above stated rule, that the trustee under such instrument as appears here may represent the bondholders, as defendant in foreclosure proceedings; and that no such interpretation is intended by the Supreme Court of Illinois, is manifest on reference to the course of parallel decisions in such court upholding the rule that representation by the trustee is sufficient in like cases. *Land Co.* v. *Peck*, 112 Ill., 408, 435; *Farmers L. & T. Co.* v. *Lake St. El. Co.*, 173 Ill., 438, 457-460 and citations.

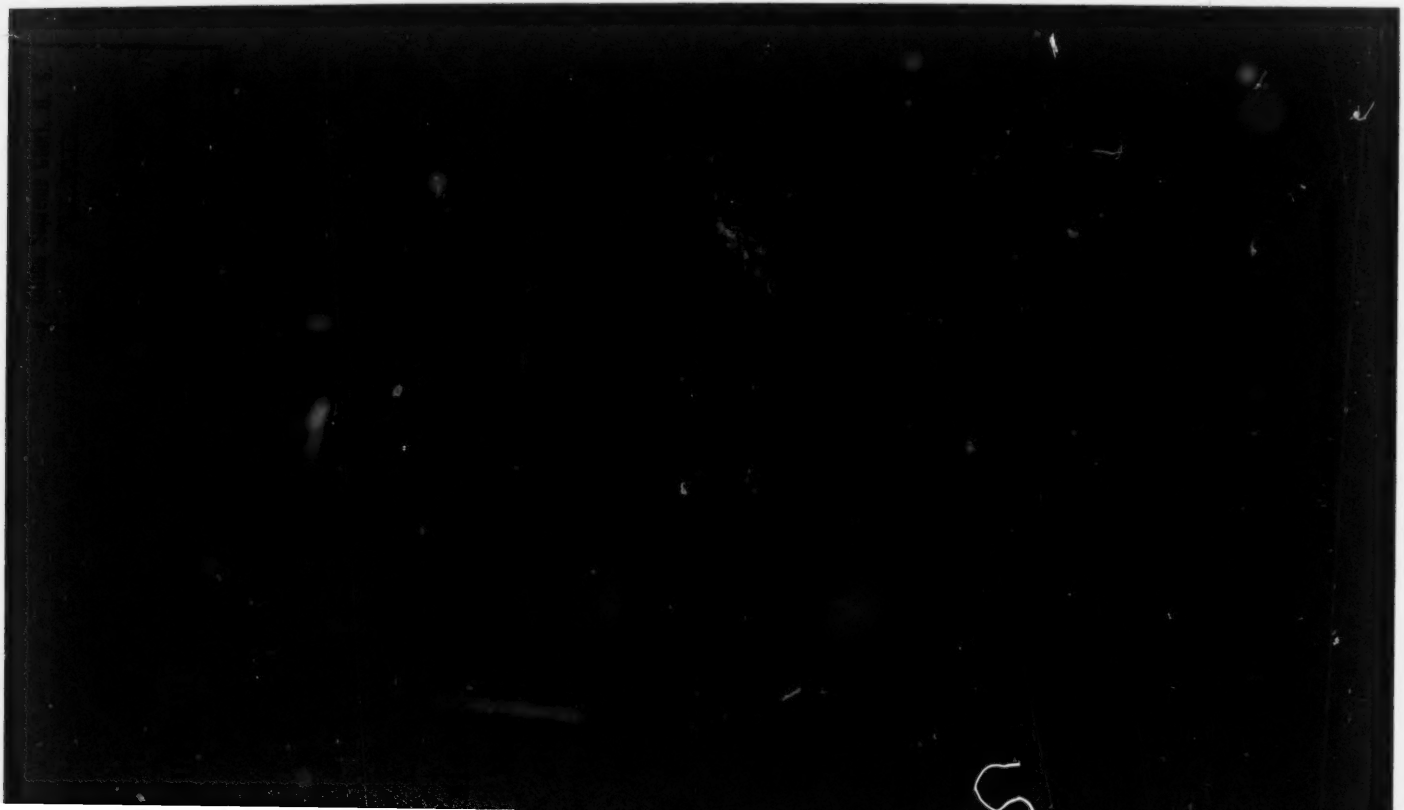
We are of opinion, therefore, that the controversy on the part of these appellees, that they were not represented by the trustee and not bound by the

foreclosure decree, is thus brought within the cognizance of the trial court, for exclusive determination and final relief for its settlement in conformity with equity, so that decree thereupon is subject only to review or revision on appeal. The sufficiency of the bill to that end does not rest on the question of power to extend the relief to an injunction (temporary or final) restraining litigation of the controversy by the parties in a State court, as prayed therein, for the reason that cause is well stated for other equitable relief which is plainly within such jurisdiction. That question, however, of injunctional relief is distinctly presented, and is discussed in briefs and oral argument, as not only the chief issue in dispute, but the one on which the trial court dismissed the bill as not cognizable; and remarks in the opinion of this court, in *Lewis* v. *Peck, supra*—arising in another phase of the controversy between some of these parties—are cited and seemingly relied upon in support of such ruling. The doctrine upon which that case was decided is inapplicable for solution of the question of authority to enjoin the appellees under this ancillary bill, as the issue of contempt there involved, rested on an order entered by the trial court, long after the final decree, enjoining all parties to the decree and persons claiming under them, from setting up title as against the purchasers under the foreclosure decree. For alleged violation of such order, in thereafter bringing suit in a State court, on behalf of certain holders of bonds subject to the foreclosure decree (attempting another foreclosure of their mortgage), the plaintiff in error, an independent counsel for such bondholders, was con-

victed in the trial court of contempt. On writ of error the judgment thereupon was set aside, as stated in the opinion, solely upon the ground that neither the individual bondholders nor plaintiff in error were actual parties to the decrees, by service or appearance—with the bondholders only constructively bound by the decree, through service on the trustee—and for want of jurisdiction *in personam*, the order referred to was not "operative against the individual bondholders, who were not served," nor against the plaintiff in error. With jurisdiction established under this bill over persons and subject matter, no such issue arises, and the solution involves only the inquiry of power in the court of primary jurisdiction, to extend ancillary relief in such case to restraint of prosecution by the present bondholders of the foreclosure suit brought in a State court; and we believe authority for such injunctional relief is upheld and finally settled by the recent decisions of the Supreme Court in *Riverdale Mills* v. *Manufacturing Co., ante,* and *Gunter* v. *Atlantic Coast Line,* 200 U. S., 273, 277, 292. In the first mentioned case that issue arose under analogous facts, and the various jurisdictional objections urged in the case at bar are exhaustively considered and overruled in the opinion; and the power of the court to administer such relief, "where it is acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction," is distinctly reaffirmed in the *Gunter* case. In both opinions the terms of Section 720, R. S., are considered and held inapplicable to such relief; and such interpretation

is decisive for settlement of any doubt thereof, intimated in the opinion above referred to, in *Lewis* v. *Peck*.

The decree appealed from is, therefore, reversed, and the cause remanded to the Circuit Court, with direction to overrule the several demurrers to the bill and proceed thereunder in accordance with this opinion.



IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

## No. 75.

ALLEN A. BROWN, SABRA HODGKINS, MARY A. EVANS, ROBERT E. WASON, ORRIN WARREN, WILLIAM B. TRASK, HARRIET N. HOUGHTON, CHARLES M. PAGE, JAMES SCHOULER, GEORGE W. FAIRBANKS, C. H. VENNER COMPANY, A CORPORATION; CIDELE VENNER, JAMES HAMILTON LEWIS, AND ELIJAH N. ZOLINE, APPELLANTS,

*vs.*

THE ALTON WATER COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

## REPLY BRIEF FOR APPELLANTS.

### As to the Jurisdiction of This Court.

The jurisdiction *as a Federal court* was distinctly challenged below (see answer, § 1, printed Record, 94; certificate of circuit court, Rec., 162).

And we say that without regard to the question whether the jurisdiction of the circuit court as a Federal court was challenged by the demurrers.

**Constitutional Questions in the Record.**

The answer, paragraph 16, Rec., 102, claims the benefit of the Fifth and Fourteenth Amendments to the Constitution of the United States and alleges that the property of the defendants below was taken from them by a decree of the circuit court of the United States without notice in a suit in which they were not parties and without due process of law, in violation of the Federal Constitution, and appellants by said answer asked the court to hold that said decree of the Farmers Loan & Trust Company sought to be enforced against them is of no force and effect because of the aforesaid Federal constitutional provisions.

Paragraph 15 of the answer (Rec., 99-102) pleads the constitution and laws of Illinois as part of their contract; sets up that the suit, having originated in the State court, was afterwards removed improperly to the Federal court; that appellant-bondholders should have been brought into court by publication under the statutes of Illinois, as unknown owners; that the circuit court impaired the obligations of their contract within the meaning of Section 10 of Article 1 of the Constitution of the United States.

The certificate of the circuit court in this case, among other things, recites (Rec., 163):

> "And thereupon the court, after hearing the arguments of counsel, held that the facts stated in the answers do not constitute a sufficient defense in law to the cause of action of the complainants, *and that no constitutional guarantees* or *privileges* of the defendants as set forth in their answers *were violated* by the entering of the decree set forth in the bill and answer, *and that the defendants were not deprived of their property without due process of law* in violation of the Federal Constitution" (Rec., 163).

The correctness of these holdings is challenged by the Federal assignment of errors filed herein, which are fully set forth in original brief and in the printed record (pp. 165-168).

In a case before this court on the ground that a constitutional question is involved, this court has jurisdiction of the whole case and every question involved therein.

Fields *vs.* Asphalt Co., 194 U. S., 621.

Loeb *vs.* Columbia Trustees, 179 U. S., 473.

Holder *vs.* Aultman, 169 U. S., 81.

American Sugar Refinery *vs.* Louisiana, 179 U. S., 89.

Scott *vs.* McDonald, 165 U. S., 58, and cases cited.

Fayerweather *vs.* Ritch, 195 U. S., 276 (questions of *res adjudicata*).

National Foundry Co. *vs.* Water Supply Co., 183 U. S., 216 (*res adjudicata*).

Horner *vs.* U. S., 143 U. S., 570.

Penn Mut. Life *vs.* Austin, 168 U. S., 685.

We respectfully submit that this court has jurisdiction on this appeal.

**The Trustee Had no Power to Represent the Bondholders.**

Counsel for appellee in their brief have nothing to say that under the provisions of the trust deed of the Boston Water and Light Company to the International Trust Company the trustee had no authority to litigate the title to the property between adverse parties, but they seem to rely on supposed principles of general law. We again respectfully suggest that the following clause of the trust agreement shall be first considered, viz:

> "THE TRUSTEE HEREUNDER SHALL NOT IN ANY EVENT HAVE ANY DUTY OR RESPONSIBILITY AS TO THE VALIDITY HEREOF OR THE SECURITY HEREBY AFFORDED, NOR AS TO THE EXECUTION, ACKNOWLEDGMENT, RECORDING, OR RENEWAL HEREOF, NOR (UNLESS SAID TRUSTEE IS CALLED UPON TO TAKE ACTIVE MEASURES TO ENFORCE THE SECURITY BY FORECLOSURE OR OTHERWISE, WITH DUE INDEMNITY) AS TO THE INDEMNITY, TAXES, OR REPAIRS, OR ANY OTHER MATTERS AFFECTING THE SECURITY; AND IN GENERAL IT IS UNDERSTOOD THAT PRIOR TO BEING CALLED UPON THEIR SOLE DUTY IS CONFINED TO CERTIFYING BONDS AS OF THE SERIES MENTIONED HEREIN" (Rec., 41).

**Review of Authorities Cited by Appellee on the Proposition that the Bondholders Were Represented by the Trustee.**

Toler *vs.* East, 67 Fed., 168:

The question of the construction of the trust deed, such as the one at bar, was not involved; the court took it for granted that the trustee had the power to represent the beneficiaries. No question of local law was there involved. It is not a parallel case.

Richter *vs.* Jerome, 123 U. S., 233:

That case merely holds that if the trustee in good faith foreclosed a mortgage, obtains a decree and sale, whatever binds the trustee in the foreclosure proceedings will bind the *cestui que trust*. Again, there were no adverse interests or parties in the suit claiming title adversely to the grantor.

Shaw *vs.* Railroad Co., 10 Otto (100 U. S.), 605:

That was a case where a trustee brought suit to foreclose because of default of interest. Adverse title to real estate under different grantors was not involved, and the contention was made that a decree could not be made in his favor without the bondholders joining in the suit, and it was held that he could file the bill to carry out his trust. The authority of the trustee to represent the bond-

holders was also not questioned. This case is an authority against the contention of appellant that the remedy of the bondholders in the case at bar is a bill of review. It was held in that case that to avoid what the trustee has done in their behalf the bondholder must proceed in some other way than by a bill of review.

The Shaw case was decided on the theory that a majority of bondholders under the same trust deed had a right to foreclose against the wishes of the minority. Another distinction should be observed, because it was a case of a *railroad* mortgage on property situated in many States, and the laws of no particular State could apply, whereas in the case at bar the property was situated wholly and solely within the limits of a single township, viz., the village of Upper Alton, Illinois.

Beals *vs.* Missouri & Texas Ry. Co., 133 U. S., 290:

In that case the authority of the trustee to represent the bondholders was not questioned, but it was charged that he was served in person only and not as a trustee, and allowed judgment to go by default, without notice to bondholders and by collusion with the attorney representing the complainants in the foreclosure suits. There was no claim of adverse title, but all parties claimed under same grantee; and inasmuch as the fraud charged against the trustee was not proven, the bill was dismissed. For that reason the case is not in point.

Lewis *vs.* Peck, 154 Fed.:

That case is decidedly against appellee. Said Judge Seaman:

> "If *res judicata,* or otherwise without merit, such determination, in the first instance at least, is for the forum in which such suit is brought, and the court of prior jurisdiction of the subject-matter cannot, as we believe, enjoin such procedure in another court of co-ordinate jurisdiction; nor can it rightly be assumed by any court, in thus directing conveyance to a purchaser under its decree, that co-ordinate judicial tribunals would disregard such decree or fail to give it due effect when so involved in subsequent litigation."

And again we find in same opinion:

> "No authority is brought to our attention which sanctions the enjoining the *mere commencement of the suits* in State court with no disturbance of possession, unless within the exception named in section 720 U. S. Stat. And we are of opinion that the order in question, in so far, at least, as it was treated as *operative against the filing of bills on behalf of individual bondholders,* was not within the limited jurisdiction reserved in the trial court." * * *
>
> "The mere institution of suit in such case does not disturb the prior jurisdiction or adjudication in any degree. As said by Judge Grosscup, speaking for this court in Copeland *vs.* Bruning (127 Fed., 550, 552), in reference to like contention that a suit in the State court 'challenged the decree of

> the Federal court:' 'Let this be admitted, even then the injunction is not justified, for to the extent that the subject-matter of the suit in the State court was already settled by former adjudication, the defense should have been by plea in the court when the suit was brought, and not by injunction in another jurisdiction. No possession of the *res* was involved, and no conflict of courts could have followed that would have affected the decree in the United States Court.'" * * *

The opinion further proceeds:

> "Whatever the interests or rights of the bondholders may be under the terms of the trust deed—whether within the general rule and thus fully represented and foreclosed by the presence of the trustee, or exceptional as they contend—*they are bound by the decree only to the extent authorized by the trust deed in such representation.* If they have claims of independent right, not so represented, as they contend, they are neither within the terms of the order, as claimants under the trustee, nor subject to the jurisdiction of the trial court *for any form* of injunction against their exercise of independent right to sue upon such claim."

**The Rule of Illinois is not Varied by the Cases Cited by Appellee.**

Land Co. *vs.* Peck, 112 Ill.—

Is not in point, because it was not a case between parties claiming title to the property sought to be

foreclosed adversely, as in the case at bar. The court, at page 432, says:

> "We regard the scope of the whole litigation as involving but the enforcement of liens on real estate, by mortgage or otherwise, the establishment of such liens, the release of and redemption from them, and the resistance of such redemption—all on the part of creditors, there being no adverse claims of title arrayed against each other. In the determination of such questions no freehold is involved, as this court has frequently decided. * * *
>
> "A freehold is never involved within the meaning of the statute, except when the primary object of the suit is a recovery of a freehold estate, the title whereof is decreed put at issue." * * *

The number of parties in that case was so great that the court excused the bringing in of the beneficiaries under the mortgages.

The opinion does not disclose whether the provision of the Illinois statute was called to the court's attention. It seems that the decision was predicated on the general chancery practice in such cases.

And, again, the question was not whether a bondholder who is not made a party to a suit brought against the trustee is bound by the decree, but where the beneficiaries are very numerous the court could proceed with the subject-matter of the suit. The objection for want of parties was not made by the bondholders themselves. Nor was the

question of the authority of the trustee to represent the bondholders involved in that case.

St. L. & P. R. R. Co. *vs.* Kerr, 153 Ill., 189, was a railroad mortgage, and suit was brought to establish a contractor's lien against the railroad. There was no question of adverse title involved in that case, and the court held that the contractor, for the purpose of establishing his lien, did not have to join the bondholders, but that the trustee alone was sufficient. The trust deed expressly authorized the trustee to defend this class of cases. This case is hardly an analogy with the case at bar.

The case of Farmers L. & T. Co. *vs.* Lake St. Elevated R. R. Co., 173 Ill., was a suit brought by the elevated road to remove the Farmers Loan & Trust Company as trustee, because the trustee, being a corporation of New York, did not comply with the foreign corporation laws of the State of Illinois. The validity of the security itself was not challenged. In this particular case the court held that it was not necessary to join the bondholders as parties defendant. The trustee in that particular matter was an active and managing trustee. The court removed the trustee. It will be observed that the opinion was written by Judge Magruder, *who later wrote the opinion in Chandler vs. Ward,* 188 *Ill.,* 322, holding that the holders of notes negotiable by delivery under something like thirty trust deeds, are necessary parties where the

validity of the security itself was challenged, and which was attempted to have canceled in that proceeding.

Kerrison *vs.* Stewart *et al.*, 93 U. S., 155, is decidedly against the appellee. That case was not a railroad mortgage, and the court refused to apply the general doctrine sometimes applicable to railroad trusts, and confined its decision as to whether the trustee had the authority or power to represent his *cestui que trust.*

The court say:

> "It cannot be doubted that *under some circumstances* a trustee may represent his beneficiaries * * *
>
> "The difficulty lies in ascertaining whether he occupies such a position, not determining its effect if he does."

The court then reviewed the evidence in the case and found that the trustee actually represents his *cestui que trustent,* with their knowledge and consent; held that they were sufficiently represented. This is not the situation in this case.

The case of Kent *vs.* Lake Superior , 144 U. S., 75, was also a case where all the bonds were under same grantor. The trustee filed a suit, and certain receiver's certificates were given priority upon the same property. This was not a suit where anybody claimed title adversely under a different grantor and grantee, and under a different fran-

chise, as is the case at bar. It was also a railroad mortgage.

In Dodge *vs.* Tulleys, 144 U. S., 451, the question decided was merely that the trustee in a foreclosure suit was entitled to an attorney's fees. We fail to see the applicability of that case to the case at bar.

Atlantic Trust Co. *vs.* Dana, 128 Fed., 209, was a case settling priority of debts over mortgages. The receiver of the court conducted the litigation for all parties. Held, that the matter was adjudicated as to all parties to the suit. We cannot see how that case sheds any light on the questions in this case.

Manson *vs.* Duncanson, 166 U. S., 533, was a case where a minor was represented by a guardian *ad litem*. We fail to see the analogy to the case at bar.

Corcoran *vs.* Chesapeake, etc., Canal Co., 94 U. S., was a suit relating to interest coupon notes which had been adjudicated in the courts of Maryland. The trustee was in court as trustee. He afterwards claimed that his individual rights as a bondholder was not adjudicated, and that he bought the bonds subsequent to the adjudication, and the court properly held that it was not feasible.

Bowling *vs.* Virginia Passenger Co., 132 Fed., 921, is a *nisi prius* opinion holding that where a trustee brings suit to foreclose, the bondholders in whose behalf the foreclosure is brought cannot intervene. To the same effect is the case of Clyde *vs.* Richmond, 55 Fed., 445, where bondholders asked to become party plaintiffs.

Farmers' Loan & Trust Co. *vs.* Kans. City, W. & N. R. R. Co., 53 Fed., was a similar case. Trustee was party plaintiff under terms of mortgage.

**As to Ancillary Jurisdiction.**

Root *vs.* Woolworth, 150 U. S., 411, is an authority against appellant, for it limits ancillary proceedings merely to the *parties* to the cause. The court, at page 410, says:

> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, *and the subject-matter and the parties are the same* in each proceeding."

The Riverdale case, 198 U. S., 189, holds that the Federal court may, by ancillary suit, protect the title which it has decreed as against *all parties to the original suit and prevent any of such parties* who had previously approved and themselves litigated from relitigating questions of right already determined against them. In that case the parties to the suit attempted to relitigate the same suit on

the theory that the Federal court had no jurisdiction. The court say:

> "It must be borne in mind in this connection that the Huguley Manufacturing Company was made a party defendant, and appeared in the original foreclosure suit, and also that it had purchased the property and owned it subject to the trust deed. So the bill in the State court specifically avers, and the record of the proceedings in the foreclosure suit shows that it took an active part in the litigation. It admitted in that litigation that it was a citizen of Georgia. It now goes into a State court, and, averring that it is a citizen of Alabama, the State of which the plaintiff was a citizen, contends that the United States court in Georgia had no jurisdiction; but having been in that United States court litigating the case on its merits and its rights there determined, that court has power to protect its decrees as against any action which such litigant may take in any other court."

Julian *vs.* Cen. T. Co., 193 U. S., 93, is the next authority relied upon. In that case the question was the settlement of priority of liens on some property, and over which questions the court reserved special jurisdiction. No question of adverse ownership of the same property sought to be foreclosed between different owners was involved.

**As to the Forum.**

If it be true that appellants are not bound by the foreclosure decree in the Farmers Loan and Trust Company case, then they can select the forum within which they can foreclose their own mortgage, and therefore the authorities cited on pages 38 and 39 of the appellee's brief, that same should have been done in the court where the foreclosure took place do not apply.

Moreover, the objections of appellant bondholders that they had no notice of the proceedings, etc., were stricken out by the court (see paragraph 4 of answer, Rec., 95).

Veterlein *vs.* Barnes, 124 U. S., 171, cited, is not in point. The court say:

> "The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties, so that the court may 'finally determine the entire controversy, and do complete justice by adjudging all the rights involved in it.' Story *vs.* Livingston, 13 Pet., 359, 375; Shields *vs.* Barrow, 17 How., 130, 139. But in a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, *if the trustee has such powers or is under obligations,* with respect to the execution of the trust, that 'those for whom he holds will be bound by what is done against him, as well as by what is done by him.' In such cases or such representation by trus-

> tees, the beneficiaries will be bound by the judgment, 'unless it is impeached for fraud or collusion between him and the adverse party.' Kerrison *vs.* Stewart, 93 U. S., 155, 160."

Our contention has always been that the trustee had no such powers, was not under such obligations to defend as against a stranger claiming title adversely. The trust deed provides that the trustee shall have no duty or responsibility regarding the validity of the security. Hence it neither had the power nor the obligation within the meaning of said decision.

All other points find a sufficient answer in our original briefs.

Respectfully submitted,

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,
*Attorneys for Appellants.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
NOV 29 1911
JAMES H. McKENNEY,
CLERK.

No. 75.

ALLEN A. BROWN, SABRA HODGKINS, MARY A. EVANS, ROBERT E. WASON, ORRIN WARREN, WILLIAM B. TRASK, HARRIET N. HOUGHTON, CHARLES M. PAGE, JAMES SCHOULER, GEORGE W. FAIRBANKS, C. H. VENNER COMPANY, A CORPORATION; CIDELE VENNER, JAMES HAMILTON LEWIS, AND ELIJAH N. ZOLINE, APPELLANTS,

*vs.*

THE ALTON WATER COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

## SUPPLEMENTAL BRIEF FOR APPELLANTS.

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,
*Attorneys for Appellants.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

## No. 75.

ALLEN A. BROWN, SABRA HODGKINS, MARY A. EVANS, ROBERT E. WASON, ORRIN WARREN, WILLIAM B. TRASK, HARRIET N. HOUGHTON, CHARLES M. PAGE, JAMES SCHOULER, GEORGE W. FAIRBANKS, C. H. VENNER COMPANY, A CORPORATION; CIDELE VENNER, JAMES HAMILTON LEWIS, AND ELIJAH N. ZOLINE, APPELLANTS,

*vs.*

THE ALTON WATER COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

## SUPPLEMENTAL BRIEF FOR APPELLANTS.

We omitted, by inadvertence, as part of our original argument to call the attention of the court to the following proposition:

Prior to the final decree in this action in the Federal court appellees have gone into the State court—Madison County, Ill., Circuit Court—filed their plea of *res adjudicata* and were sustained by that court and a judgment for costs was entered in its favor and the bill to foreclose filed by appellants-bondholders was dismissed. From the decree of said State court appellants sued out a writ of error in the Appellate Court, Fourth District of Illinois (Rec., 160), which writ of error the Circuit Court of the United States for the Southern District of Illinois ordered appellants, by its final decree, to dismiss within thirty days from the entry of same (Rec., 161-162).

So that the matter shapes itself thus:

Appellee submitted the questions of *res adjudicata* to the State court, succeeded in defeating appellants on said plea, obtained a dismissal of the bill and a judgment for costs; then, after a writ of error was issued from the Appellate Court of the Fourth District of Illinois to review said decree, it goes to the Federal court and obtains an injunction restraining appellants from prosecuting their writ of error in the State appellate court—a remedy given by the State statutes to review the decrees of State courts—and thus take to itself the benefits of the decree, including the judgment of costs which it caused to enter in the State court against appellants.

The Federal courts will not presume in advance that the State appellate courts will not decide according to law. This is not a case of an actual interference with the possession of property in the hands of the Federal court, and we respectfully submit that the case, having gone to a decree in favor of appellee in the State court, appellants should be permitted to be reviewed in an orderly way by the methods and laws of the State in which the decree was entered. Copeland *vs.* Bruning, 127 Fed., 550; Royal Trust Co. *vs.* Washburn, 139 Fed., 865; Lewis *vs.* Peek, 154 Fed., 273.

No injunction ever goes to the court having a concurrent jurisdiction of the question. It is a rule absolutely necessary to be observed by courts which have concurrent jurisdiction, that in all cases where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in any other court. This rule it is said "has its foundation not merely in comity, but in necessity." * * * (Orton *vs.* Smith, 18 How., 263, 265.)

## II.

### On the Point that the Decree is Outside of the Issues.

In addition to the argument presented in our original brief upon this point (at pages 66 to 73, inclusive), we beg to call the court's attention to the fact that there is no prayer in the bill of the Farmers Loan and Trust Company for any relief whatever, either against the Boston Water and Light Company, the owner in fee, or against the International Trust Co., Trustee (see printed record, p. 142). Therefore, the decree as to either of them, which is now sought to be enforced by the so-called ancillary bill, is void as being in excess of the issues within the meaning of the authorities cited in our original brief at pages 71-72. The only prayer is "that any property taken from the property covered by the trust deed to your orator may be restored; that the equitable ownership of said new pumping works and additional water mains may be ascertained and decreed and the amounts due thereon and paid thereon may be ascertained and provided for" (Rec., 142).

We have thus a prayer for an accounting, *not directed as against any particular person or corporation,* to ascertain the amount due on the new property erected by the Boston Water & Light Company.

There was no such accounting decreed; no accounting had; and, in the absence of it, *no decree of sale* of the property and franchises of the Boston Water and Light Company could be based upon said prayer.

**Moreover, there is no prayer in said bill for a decree to sell the property and franchises of the Boston Water and Light Company which were mortgaged to the International Trust Company to secure the bonds of appellant-bondholders.**

No money decree for any amount was asked against either the Boston Water and Light Company or against the International Trust Company, Trustee; the prayer for the payment of money and for the sale of the property being directed solely against the Alton Water Works Company and the New England Water Works Company, its successor, the exact language of the prayer being as follows:

> "That in default thereof, all the property and franchises of the Alton Water Works Company and of the said New England Water Company covered by said trust deeds to said Caldwell and to your orator may be sold under the decree of this court to satisfy the amount so found due" (Rec., 143).

Aside from the jurisdictional questions involved in this record, and aside from the question as to whether the bondholders of the Boston Water &

Light Company were necessary and indispensable parties defendant, the fact stands boldly forth that no relief was prayed against the Boston Water & Light Company, the International Trust Company, Trustee, or its bondholders, and that as to them the foreclosure decree which sold their property was utterly without jurisdiction and foundation and totally wanting in any force or validity.

For these reasons, as well as others in the main brief recited, these appellant-bondholders, through the entry and enforcement of the decree of the Circuit Court of the United States for the Southern District of Illinois in said Farmers' suit, have been and are now deprived of their property without due process of law, and they cannot be enjoined from prosecuting their writ of error in the State Appellate Court or to take other proceedings to recover that property which was taken from them by a void decree by an injunction issuing out of the United States Circuit Court for the Southern District of Illinois, whether it be in an ancillary or an original proceeding, based upon any claim of title arising under the foreclosure decree above referred to.

Respectfully submitted,

JAMES HAMILTON LEWIS,
ELIJAH N. ZOLINE,
*Attorneys for Appellants.*

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CLERK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 75

ALLEN A. BROWN ET AL.,
*Appellants,*

*vs.*

ALTON WATER COMPANY,
*Appellee.*

## ARGUMENT FOR APPELLEE.

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GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

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## No. 75

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ALLEN A. BROWN ET AL.,
*Appellants,*

*vs.*

ALTON WATER COMPANY,
*Appellee.*

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## ARGUMENT FOR APPELLEE.

The litigation over the foreclosure of the water works at Alton, Illinois, has been four times before the federal Court of Appeals for the Seventh Circuit, three times before this court on petitions for *certiorari*, and is now before this court for the fourth time on this appeal. On all points raised the first mortgagee, the purchaser at the foreclosure sale and the purchaser's assignee, the present appellee, have been successful, except that on one appeal the Circuit Court was held to have erred in

ordering an attachment for contempt against one of the present appellees.

The controlling question in the present record is whether the trustee in a junior mortgage deed of trust represented holders of bonds secured thereby, when it was made a defendant to a suit to foreclose a prior mortgage. Were the rights of the holders of junior bonds settled in that foreclosure proceeding? All other points raised hang on that question.

This cause was heard in the Circuit Court on bill and answers.

## STATEMENT OF THE CASE.

This is an ancillary suit brought by appellee in the federal court at Springfield, Illinois, to restrain appellants from further prosecuting a foreclosure proceeding begun by them in the Circuit Court of Madison County, Illinois. This suit is based on the fact that the mortgage sought to be foreclosed in the state court and all the matters involved in that proceeding, were settled by a final decree entered in a foreclosure suit in the United States Circuit Court at Springfield, long before the commencement of the state court proceeding, and on the theory that a court can, upon a bill ancillary to a decree formerly entered by it, protect, by injunction, its former decree and the rights of the purchasers thereunder.

Demurrers, general and for want of jurisdiction, were interposed to this bill and the Circuit Court sustained the demurrers and dismissed the bill, evidently considering that a court has no power or jurisdiction to so protect or enforce its decree, and that we ought to have pleaded the former decree as *res judicata* in the later state court litigation.

The Court of Appeals reversed the Circuit Court, holding that a chancery court, *state or federal*, had power to so protect its decree and purchasers thereunder, and also holding that all the questions raised in the later state court proceedings had been finally settled in the prior federal decree. 166 Fed., 840.

On January 1, 1887, the Alton Waterworks Company owned and possessed the waterworks which supplied the City of Alton with water. There was a $31,000 mortgage to Caldwell upon the property. On that day, the Alton Waterworks Company executed a mortgage to the Farmers Loan & Trust Company, as trustee, to secure $200,000 of bonds. The mortgage contained the usual after-acquired property clause, and also clauses providing that all *additions, renewals and extensions* of the waterworks plant should come under the lien of the mortgage. $169,000 of those bonds were issued, the other $31,000 being reserved to take up the first mortgage.

Afterwards the property passed into the control of C. H. Venner, who caused it to be transferred to the New England Waterworks Company, of which he was president. He then caused to be issued one or two other mortgages upon the property, with the American Trust Company as trustee. (Rec., 215.)

The intake and pumping plant that supplied the waterworks system with water was situated on the bank of the Mississippi River. In 1897 the city had grown so that part of it extended along the bank of the river above the intake and pumping house, and the city demanded that the intake and pumping house should be moved farther up the bank of the river, to avoid contamination of the water.

Venner caused the land for the new power house to be acquired in the name of the Boston Water & Light Company, of which he was president (Rec., 216), and there was erected thereon a new power house, to which was removed, from the old power house,

the large pump that supplied the entire system with water, and some other machinery, and the old power house was then dismantled. It was also claimed that certain water mains laid about that time in the City of Alton, under the franchise to the Alton Waterworks Company had been laid by the Boston Water & Light Company. The mains and the new power house were in the city of Alton, *part of the waterworks system,* and must have been erected and laid under the franchise to the original mortgagor as it is the only franchise the city of Alton ever granted.

About a year afterwards a franchise was obtained from the village of Upper Alton to extend the water system into that municipality and some water mains were laid thereunder, being, however, but continuations or extensions of the principal waterworks lying in the City of Alton. (Rec., 208.)

In October, 1897 (Rec., 8), more than a year before the Upper Alton franchise was obtained, the Boston Water & Light Co. executed a mortgage trust deed upon the new power house that was to be built and some water mains, to the International Trust Company, to secure an issue of $200,000 of bonds, and it is claimed that those bonds were sold and are outstanding for value.

**Commencement of Litigation.**

In October, 1901, the United Waterworks Company filed a creditor's bill against the New England Water Company in the Circuit Court of Madison County, making defendant thereto the Farmers Loan and

Trust Company as trustee and others. The latter company appeared to that bill and also filed, in the same court, a bill to foreclose the mortgage to it, dated January 1, 1887. To that foreclosure bill were made parties, among others, the Boston Water & Light Company and the International Trust Company, and the bill averred that the new power house and the water mains claimed by the Boston Water & Light Company and the franchise for extending those mains into the village of Upper Alton, all constituted renewals, additions or extensions of the original waterworks plant, and as such came under the lien of the mortgage to the Farmers Loan and Trust Company, and that they had all been built and acquired with income from the main waterworks plant. (Rec., 209.)

The two causes in the Madison County Circuit Court were consolidated and a receiver was appointed. Thereupon, upon petition of the Boston Water & Light Company, claiming a separable controversy existed, the state court ordered the consolidated cause removed into the federal court at Springfield. A motion to remand by the Farmers Loan and Trust Company was overruled.

The International Trust Co. appeared and filed an answer (Rec., 7, 8, 151-3), insisting strongly that the new power house and pumping station and certain water mains were not under the mortgage to the Farmers' Loan and Trust Company, and on behalf of its bondholders (the present appellants) pressed the points on which they now rely.

The consolidated cause proceeded, after much evi-

dence, to a final foreclosure decree in the federal court at Springfield. (Rec., 8, 9, 153.)

By that decree it was adjudged that the new pumping house and the additional mains and the franchise to extend the mains into Upper Alton all constituted one waterworks plant, to be considered as an entirety, and that it all came under the mortgage to the Farmers Loan and Trust Company by virtue of its provisions concerning renewals, extensions, additions and after-acquired property. The decree then found the priorities of the different liens upon the property, and held that the Caldwell or $31,000 mortgage was the first lien, the Farmers Loan and Trust Company mortgage was the second lien, the American Trust Company mortgage was the third lien, and that they were all prior in lien to the trust deed to the International Trust Company. The decree contained all the provisions usual in such a decree, finding the amount due, directing payment, ordering a sale in default of payment, and barring all parties and their privies from any interest in the property.

From that final foreclosure decree an appeal was taken by the International Trust Company and others, and the decree was affirmed. 136 Fed., 521. A full statement of the matters involved, much better than we can make in this brief, is given in the statement of facts and opinion in the case just referred to, and the opinion shows that the two main points relied on by appellants and decided by the court were that the case was properly removed to the federal court because there was a separable con-

troversy between the Boston Water & Light Company and the Farmers' Company.

The Boston Water & Light Company and the International Trust Company applied to this court for a writ of *certiorari* to review that decision, and the application was denied. 197 U. S., 622.

Thereupon a foreclosure sale took place and the property was sold for about enough to satisfy the mortgage to the Farmers Loan and Trust Company (and the Caldwell or $31,000 mortgage), and the subordinate mortgagees, including the bondholders secured by the trust deed to the International Trust Co., received nothing. That sale was confirmed.

A question arose over distribution of proceeds among coupon-holders, which resulted in a further appeal which appears in 137 Fed., 729. The matters involved in that opinion, however, have no bearing upon questions here involved other than to show that the C. H. Venner Company, one of the bondholders under the trust deed to the International Trust Company, took an active and vigorous part in the litigation.

The persistent character of the C. H. Venner litigation is shown by many printed reports of the courts of last resort throughout this country, and perhaps on account thereof the purchaser at the foreclosure sale caused to be inserted in the decree confirming the sale an injunctional order restraining all the parties to that cause, their attorneys, etc., and those claiming under them, from engaging in any further litigation over the matters settled by that decree.

After the litigation was entirely settled and he purchaser was in possession of the property, a suit was commenced in the Madison County Circuit Court by appellants, seeking to reforeclose the same trust deed to the International Trust Company, without in any way mentioning the former litigation. The bill made, among others, the International Trust Company and the C. H. Venner Company defendants, probably because the latter could not safely appear as complainants on account of the injunctional order referred to. The complainants alleged that they were bondholders secured by the trust deed to the International Trust Company, and sought to relitigate the issues already litigated in the Federal Court. Thereupon the purchaser applied to the Federal Court at Springfield to enforce the order of injunction against these parties, and the Federal Court entered a contempt order for that purpose. From that order an appeal was taken and the contempt order was reversed, 154 Fed., 273, on the ground that the injunctional order inserted in the decree confirming the sale was not pertinent to that decree, which was simply an administrative decree. The opinion discusses whether it is better practice to apply for such an inpunction or to plead the former foreclosure decree as *res judicata* in the state court. The proceeding and appeal last above referred to, do not appear in the record of the case at bar, but as it is referred to by appellants, we have made this statement and refer to the reported opinion.

After the decision last referred to, the same bill to reforeclose the trust deed to the International Trust

Company was refiled in the Madison County Circuit Court.

Thereupon, the bill in the case at bar was filed by the Alton Water Company, the assignee of the purchaser at the main foreclosure sale, against all the other parties to the state court bill, praying that the further prosecution of the present state court suit be enjoined. To that bill the International Trust Company bondholders filed general and special demurrers (Rec., 92-105.) Those demurrers were sustained and the bill was dismissed.

The Court of Appeals reversed that decree of dismissal (166 Fed., 840), holding that the bill was a true ancillary bill, that in the foreclosure case the International Company represented fully its bondholders, that the challenge to the jurisdiction of the court was to the court as a court of equity and not as a federal court, and that therefore the appeal was properly taken to the Court of Appeals. Every question involved in the present hearing was decided by the Court of Appeals against the present appellants, and we respectfully refer the court to that opinion of the Court of Appeals.

The present appellants thereupon filed in this court a petition for a writ of *certiorari* to review that decision, and this court denied the petition. 212 U. S., 581. If the denial of that petition is to be taken as a decision, every question presented on this appeal has been passed on by this court.

In opposition to that petition for *certiorari*, we submitted to this court a brief, and as the questions argued to this court on that petition for *certiorari*

were exactly the same as are here involved, this brief is largely a reproduction of the one we then filed.

The bill in the case at bar states fully the pleadings and proceedings in the main foreclosure case; states that the foreclosure bill averred that the new power house, additional mains in Upper Alton, etc., were additions or after-acquired property and therefore subject to the mortgage of the Farmers Loan and Trust Company (Rec., 7); that the Boston Water & Light Company and the International Trust Company answered and claimed that the property referred to was not built with income from the old plant, etc., but with proceeds of International Trust Company bonds and was not under the lien of the mortgage to the Farmers Loan and Trust Company (Rec., 7); that that issue was fully presented to the court and was decided in favor of the Farmers Loan and Trust Company; that the mortgage to the International Trust Company involved in the first foreclosure case covers the identical property that is involved in the suit now pending in the state court, and the mortgage is identified by recitation of parties, dates, property, and particularly by the book and page of its record. The bill now pending in the state court is made an exhibit in the case at bar, and from comparison of them it is shown that the date, parties, property and place of record of the trust deed are identical in the two bills. The identity of the subject matter of the original foreclosure case and the present state court foreclosure bill is therefore made absolutely certain.

Complainants in the present state court bill are ten holders of bonds secured by the mortgage to the

International Trust Company. That trust company is made a defendant to the state court bill, as are also about twelve other holders of the bonds secured by the trust deed to it, including the C. H. Venner Company and Cidele Venner. The present bill in the state court does not in any way refer to any of the former litigation, but is plainly and simply a bill brought by bondholders to foreclose the International Trust Company trust deed, making that trust company a defendant on account of its alleged refusal to act and joining therewith certain bondholders.

From the allegations of the state court bill it appears that the ownership of the bonds secured by the mortgage to the International Trust Company is very scattered. The bill states that all of the $200,000 of bonds are outstanding and held for value; that the C. H. Venner Company and Cidele Venner own 56 thereof, and that the other 20 bondholders who are parties to the cause own 69 thereof. The ownership of the other $75,000 of bonds is not given, but if they are as much scattered as are the other holdings (except the Venner holding), there must be at least 22 other holders of bonds not made parties to the state court suit and whose names and addresses are not given by the present complainants. It would therefore appear that there are at least 45 holders of these bonds, of which only one-half are made parties by name to the present state court foreclosure bill. The residences of the holders of bonds who are parties to the suit are given and they are pretty well scattered throughout different cities in Massachusetts, New York, Pennsylvania and Maine, and none of them are residents of Illinois. (Rec., 34-5.)

The mortgage to the International Trust Company, which is set out in full in the state court bill (Rec., 37-54) which is an exhibit in the case at bar, is in the usual modern form of corporate mortgages securing bonds payable to bearer. It provides (Rec., 45) that the trustee may declare the whole principal due (section 4); may, in case of default, take possession of the property; may operate it; may sue for and collect all receivables and apply receipts; may carry out contracts made by the mortgagor with its customers (Rec., 46); may bring suit to foreclose the mortgage and apply for a receiver (Rec., 47, paragraph 6); that all of its expenses and attorneys' fees shall be paid by the mortgagor (paragraph 7); and that the trustee will only certify one hundred of the bonds upon certain conditions (paragraph 9). By paragraph 11 (Rec., 48), any right of action under the trust deed is vested exclusively in the trustee and under no circumstances shall any bondholder or number of bondholders institute any action or other proceedings under the trust deed, etc. Sections 10, 11, 12, 13 (Rec., 48-9) and 24 (Rec., 53) give the trustee complete power to manage all litigation and represent the bondholders, providing, as is usual, that the trustee shall not be called upon to take action in court unless indemnified for its costs, but that if it so elects, it may take such action without such indemnity. It is these usual clauses to the effect that it is not the duty of the trustee to act—that it is not *required* to act—until it has been indemnified, on which appellants assert that the powers of the trustee in this particular mortgage are very limited.

## ARGUMENT.

This appeal is taken directly to this court from the Circuit Court on the ground that there was raised in the Circuit Court a question of jurisdiction of that court *as a federal court.*

Appellee insists this appeal appeal should be now dismissed on the ground that the jurisdiction of the Circuit Court, as a federal court, was not involved, as the only challenge to its jurisdiction was as to whether in the former case there was a separable controversy justifying removal from the state to the federal court, and whether any court of chancery, state or federal, can, in protecting or enforcing its former decree, enjoin later proceedings begun in another court.

We insist that the question of whether or not a former suit was properly removed to the federal court was not and could not be raised in a collateral action, and that therefore the jurisdiction of the court as a federal court was not involved in this particular.

The jurisdiction of the Circuit Court as a federal court is *the only question* that can properly come before this court on this appeal. We believe that but few of the questions discussed in appellants' brief can be considered on this appeal. When an action or suit is commenced for the purpose of carrying out and enforcing a prior decree, it is regarded as ancillary to such prior action and decree, and it has been "repeatedly held that jurisdiction

of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested."

*Pope* v. *Louisville Co.*, 173 U. S., 577.

Whether or not the defendants are bound by the decree in the main foreclosure suit and whether or not, on ancillary proceedings, an injunction should issue against them, are questions going, not to the jurisdiction of the court, but, to the merits of the controversy. If the case at bar is a suit ancillary to the former foreclosure proceedings, then the Circuit Court had jurisdiction of the present case and this appeal must be dismissed. The action of the Circuit Court in deciding the ancillary proceedings, and the merits of the controversy, and whether the injunction is proper, must be passed upon in an appeal taken to the Court of Appeals.

If, however, the court considers all the matters discussed in appellants' brief, we believe that such consideration will lead to an affirmance of the judgment from which this appeal is taken.

Appellee also insists that whether a trustee represents its *cestuis que trustent*, and whether, if the court improperly decides that the trustee does represent them, the beneficiaries are thereby deprived of their property without due process of law, while it may involve a federal question, does not challenge the jurisdiction of a Circuit Court as a federal court to hear that question.

Apart from the above question of removal from the state to the federal court, the points involved in this appeal depend largely on whether or not the

bill filed in the Circuit Court was a true ancillary bill. That question again depends upon whether the defendants to that ancillary bill, being bondholders under a mortgage trust deed running to the International Trust Company, were present in a former foreclosure case through representation by their trustee.

The basic question in this litigation is whether the present appellants, who are bondholders, were represented in former foreclosure proceedings by the trustee of their mortgage, who was a party to those foreclosure proceedings.

## I.

**The bondholders whose bonds were secured by the trust deed to the International Trust Company were fully represented by that Trust Company in the first foreclosure litigation and were bound by the decree entered in that case.**

The principle that bondholders under such a mortgage as this one are represented in all foreclosure litigation by their trustee is well established. On account of the zeal with which a contrary position is urged, we will, however, refer briefly to some cases, particularly as it is strenuously insisted that a court of equity had no jurisdiction, in this ancillary proceeding, over the bondholding complainants in the new litigation, because they were not, *constructively* or actually, parties to the first foreclosure proceeding.

In several cases the question arose upon the right

of bondholders to intervene where they were represented by the trustee, without alleging fraud against the trustee. There is no allegation in the state foreclosure bill that the International Trust Company was guilty of any fraud or dereliction of duty.

Such representation of bondholders is not confirmed to cases where the trustee is complainant or seeking to enforce the mortgage. In *Toler* v. *East Tenn.*, 67 Fed., 168, the court, on this point, said:

> "In all such cases, whether the trustee be a complainant *or a defendant*, he stands for and represents all the beneficiaries who, though not actual parties will be concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party." (p. 171.)

In *Richter* v. *Jerome*, 123 U. S., 233, the court, in considering the representation of bondholders by the trustee, said:

> "Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule." (p. 246.)

In *Shaw* v. *Railroad Co.*, 100 U. S., 605, the court said:

> "The trustee of a railroad mortgage represents the bondholders in *all* legal proceedings carried on by him affecting his trust, to which they are not *actual* parties, and whatever binds him, if he acts in good faith, binds them." (p. 611.)

In *Fletcher* v. *Ann Arbor R. Co.*, 116 Fed., 479, the Circuit Court of Appeals adhered strictly to the foregoing rule and said that the representation of the trustee bound the bondholders, "either for their benefit or their *detriment.*" (p. 481.)

In *Beales* v. *Ill., etc., R. Co.,* 133 U. S., 290, the suit was against a trustee, seeking to cancel the mortgage, and the court said:

> "The bondholders were thus fully represented in that suit and bound by the decree cancelling and annulling the bonds and mortgage, unless the decree was fraudulently obtained." (p. 295.)

In *Lewis* v. *Peck,* 154 Fed., 273, the court, considering this same International Trust Company trust deed, and, speaking of the effect of the former foreclosure in the United States Court, held that in that litigation the International Trust Company fully represented these very appellees, and, in so holding, said:

> "True, the trustee named in the trust deed securing the bonds in controversy, was a party; and the general rule under such instrument and relation is firmly established, that the trustee represents the bondholders in such foreclosure proceedings involving interests under the trust deed and that his presence is sufficient to bind the rights and interests of bondholders, who are thus constructively served and present." (p. 276.)
>
> "The final decree theretofore entered (1903) was complete and binding upon all parties for the intended foreclosure, and for definition of the title which could be conveyed to the purchaser of the *res* upon sale, together with provisions for and terms of conveyance and possession." (p. 277.)

In the case at bar the decision of the Court of Appeals (*Alton Water Co.* v. *Brown,* 166 Fed.. 840) discusses the effect of certain provisions of the procedure act of Illinois and then says:

> "Neither the terms of this statutory provision (which is common in other jurisdictions)

nor the line of cases referred to can be held applicable to set aside the above-stated rule that the trustee under such instrument as appears here may represent the bondholders as defendant in foreclosure proceedings, and that no such interpretation is intended by the Supreme Court of Illinois is manifest on reference to the course of parallel decisions in such court upholding the rule that representation by the trustee is sufficient in like cases. *Land Co.* v. *Peck*, 112 Ill., 408, 435; *Farmers' L. & T. Co.* v. *Lake St. El. Co.*, 173 Ill., 438, 457-460, 51 N. E., 55, and citations." (p. 844.)

In both of the cases last cited, petitions for *certiorari* were presented to this court and denied. We therefore insist that it is now *res judicata* in this litigation that the International Trust Co., as mortgage trustee, represented the present complaining bondholders in the original foreclosure proceedings. If this is so, it puts an end to this appeal.

In *Land Co.* v. *Peck*, 112 Ill., 408, the litigation proceeded to a decree adjudicating the rights of the holders of certain bonds. The bondholders were not parties to the litigation, but the trustees in the mortgage trust deed were. In the court above it was insisted *on direct appeal* that the bondholders were necessary parties. The court held the contrary for reasons given on pages 435 and 436 of the opinion, to which we refer.

In *St. L. & P. R. Co.* v. *Kerr*, 153 Ill., 182, a mechanic's lien man brought proceedings against a railroad company and its mortgagee, the Central Trust Company. The mortgage had been given to secure only $182,000 of bonds (p. 186). An answer was put in by the railroad claiming that the bonds were held

by not to exceed six or eight persons, and that such persons were necessary parties to the suit. The court, however, held that those bondholders were not necessary parties (p. 196). If the objection of lack of parties was not good in that case, it must have much less force in the present proceeding, where a collateral attack is made upon the decree of the federal court, and especially where the trustee in the mortgage appealed from the foreclosure decree, where that decree has been affirmed by the highest court to which it is appealable and where this court has denied petitions for *certiorari* in regard thereto.

In *Farmers L. & T. Co.* v. *Lake St. El. Co.*, 173 Ill., 429, a suit was brought by the Lake Street Company against the Farmers L. & T. Co. as trustee and as representative of bonds under an ordinary corporate mortgage. The trustee was defendant and the validity of the mortgage was attacked. On pages 457 to 460 of the opinion there is a discussion of how far bondholders are represented by the trustees, and it is held that such trustees represent the bondholders.

These decisions have not been in any way questioned, and therefore they cannot be inconsistent with the class of cases involving ordinary mortgages, securing a few promissory notes, upon a farm or building lot, upon which so much reliance is placed in appellants' argument. Most of the citations made by appellants are of that class.

The above Illinois decisions are in full accord with the doctrine of the federal courts and hold, as was held in *Kerrison, assignee*, v. *Stewart*, 93 U. S., 155, that by their *contract* or instrument of appointment,

parties may *invest* the trustee with the power to represent creditors or bondholders.

Some other cases holding that a trustee represents bondholders in such cases are:

*Beals* v. *Ill., etc., R. Co.*, 133 U. S., 290.
*Kent* v. *L. Superior Co.*, 144 U. S., 75.
*Kerrison* v. *Stewart*, 93 U. S., 155.
*Dodge* v. *Tulleys*, 144 U. S., 451.
*Atlantic Trust Co.* v. *Dana*, 128 Fed., 209.
*Manson* v. *Duncanson*, 166 U. S., 533.
*Vetterlein* v. *Barnes*, 124 U. S., 169.
*Fletcher* v. *Ann Arbor R. Co.*, 116 Fed., 479.
*Corcoran* v. *Chesapeake, etc., Co.*, 94 U. S., 741.
*Bowling Green T. Co.* v. *Virginia Co.*, 132 Fed., 921.
*Farmers L. & T. Co.* v. *No. Pacific R. Co.*, 66 Fed., 169.
*Clyde* v. *Richmond*, 55 Fed., 445.
*Farmers L. & T. Co.* v. *Kans. Cy. R. Co.*, 53 Fed., 182.

We submit therefore that nothing is shown that tends in any degree to weaken the consistent line of federal authorities holding that, in such a case as the one at bar, bondholders are bound by the representation and presence in a foreclosure suit of their mortgage trustee.

The provisions in the mortgage trust deed involved in this case concerning the power of the trustees are not appreciated by appellants' counsel and are not correctly stated in their brief. The point sought

to be made by appellants on section 24 of the trust deed shows a misapprehension of the purpose of section 24. The other sections give the trustee full powers to proceed for various defaults and give it exclusive right of action under the trust deed, and section 24, a very common and usual section, is intended only for the protection of the trustee and to enable it to ask that its costs be assured to it before it is forced into litigation.

Appellants insist that unknown owners of the land should have been advertised for in order to bind the holders of these bonds, because, in some cases where the owner of a mortgage note secured on a lot had not been advertised for according to state practice, the court held that the owner of the note was not bound. Counsel insist that the mode of summoning into court parties who are necessary parties to a foreclosure suit, constitutes a vested right in real estate, which must be observed and conformed to in federal courts. If there is such a vested right, then every foreclosure in the federal courts involving railroad mortgages is defective, because bondholders are not made defendants by name or advertised for and brought in as unknown owners. There is no provision in the federal practice for bringing in unknown owners. A rule may be served upon non-resident owners, where the proceeding is *in rem.*, requiring them to appear, but such non-residents must be named as defendants before such a rule can be entered. If, as insisted by appellants' counsel, the right to be brought into a foreclosure suit by advertisement as unknown owners is a vested property right in the holder of every bond, then it is impossible to have a

valid foreclosure in the federal courts, and the mortgage we are discussing could not be foreclosed in a federal court.

It has never been held that, as to matters of process or form or procedure, a *state* statute can control federal chancery practice. For instance, in Illinois a foreclosure sale can be had upon three weeks' advertisement in the state courts, but a foreclosure sale in the federal courts must have the four weeks' advertisement called for by the federal statute.

Moreover, the rule of practice governing who should be parties to a foreclosure suit is not matter of statute law in Illinois, as is redemption, etc. Appellants' citations to that effect are not in point. It is the old rule of chancery practice, in force in the federal courts before Illinois was a state, that all persons interested should be made parties, except in certain cases, and the case at bar comes within a well recognized and long-established exception. We do not understand why the Illinois statute providing a method of service on unknown owners is invoked in this case. It certainly makes no one a necessary party who was not a necessary party before its enactment.

Although the first foreclosure case was commenced in the state court and removed to the Federal Court by the interests represented by our opponents, yet the chancery practice of the state court did not follow that suit into the Federal Court so as to require it to change its practice to conform to state practice. Had there been a defect of parties in the original foreclosure case instituted in the state

court and removed to the Federal Court, that defect could have been cured by amendment in the Federal Court, if necessary, and if not there necessary, the complainant did not need to make such amendment. Therefore the federal practice controlled settling the pleadings, making new parties if necessary, and the final decree.

II.

**The United States Circuit Court at Springfield had ample jurisdiction in the ancillary suit at bar to enjoin the defendants from presecuting the suit now pending in the State Court.**

In discussing this point, we assume that all bondholders secured by the trust deed to the International Trust Company were, by their representation by that trustee, parties to the first foreclosure decree, and are bound by its provisions as fully as if they had been actually parties upon the record. Such a complaining bondholder was so considered as a party to the original foreclosure case in *Riverdale Mills* v. *Ala. Mfg. Co.*, 198 U. S., 188.

The right and duty of a court to restrain parties to a decree which it granted and which has become final, from relitigating the adjudicated matters in another jurisdiction and thus seeking to obtain a different adjudication of property rights fully covered by the first decree, have been fully established by this court. That right has been affirmed and maintained notwithstanding the right to plead *res judicata* in the later suit, instead of applying by

ancillary bill to the court which granted the original decree.

*Riverdale Mills* v. *Ala. Mfg. Co.*, 198 U. S., 188.

*Gunter* v. *Atlantic Coast Line*, 200 U. S., 273.

*Julian* v. *Central Trust Co.*, 193 U. S., 93, 112.

*Prout* v. *Starr*, 188 U. S., 537.

*Root* v. *Woolworth*, 150 U. S., 401.

*Dietzach* v. *Huidekoper*, 103 U. S., 494.

In the *Riverdale Mills* case, the court in affirming the decree, said:

> "This petitioner, a corporation which had acquired all the title to the property described in the trust deed passing under the foreclosure proceedings hereinbefore referred to, filed in the Circuit Court for the Northern District of *Georgia* an ancillary bill to restrain the further prosecution of the suit in the state court in *Alabama*. A temporary injunction was issued, which on final hearing was made perpetual." (p. 191.)

In *Gunter* v. *Atlantic Coast Line*, 200 U. S., 273, the Federal Court, in 1872, had passed upon and upheld a certain claim of exemption from taxation made on the part of a railroad company. More than twenty years thereafter the attorney general began suit in the state court to recover taxes, in violation of the former judgment of the Federal Court. Instead of pleading *re adjudicata* in the state court, the railroad company, or its successor, filed a bill in the Federal Court, where the former decree had been obtained, to enforce and protect that decree, and sought an injunction against the prosecution

of the later suit started in the State Court. It was held that that ancillary proceeding was proper and the injunction granted was sustained.

## III.

### The Bill is a True Ancillary Bill.

Appellants' argument that the bill in the case at bar is not an ancillary bill is based entirely upon the ground that they were not parties to the first foreclosure proceedings, either personally *or by representation*, and were not bound by the presence in that suit of their trustee, and that they had *no relation* to these foreclosure proceedings. This point necessarily depends upon the main question in this case as to whether appellants were bound by the representation of their trustee. If they were not, we concede that the bill cannot be maintained.

That it is an ancillary bill, pure and simple, is very evident. It possesses the essential characteristics of such a bill and of no other. It is based upon the decree in the foreclosure suit, and its object is to prevent certain parties, who are alleged to be bound by that decree, from relitigating in another court of co-ordinate jurisdiction, the issues and rights adjudicated and settled by the decree in the former suit. The allegation that defendants are bound by the decree may be founded on an erroneous legal conclusion or may not be sustained on the hearing, but *that fact would not change the nature of the bill* from an ancillary to an original bill, but would

simply defeat its purpose as a bill of the former class.

In *Riverdale Mills* v. *Ala. Mfg. Co.*, 198 U. S., 188, in the extract above cited therefrom, the court expressly calls such a bill an ancillary bill.

In *Gunter* v. *Atlantic Coast Line*, 200 U. S., 273, and in other cases cited under point II of this answer, such bills are treated as true ancillary bills.

In *Central Trust Co.* v. *Western N. C. R. Co.*, 89 Fed., 24, the bill was for an injunction to prevent the prosecution of a suit in the state court filed by stockholders of a corporation which was a party to a previous foreclosure suit in the federal court, in which latter suit a decree of foreclosure and sale had been entered and the property sold under the decree. In asserting the right of the federal court to protect its former decree the court said (p. 29):

> "The judgment of foreclosure is conclusive against the stockholders, both as to the validity and the amount of the claim of the Central Trust Company. *Slee* v. *Bloom*, 20 Johns., 669; *Hawkins* v. *Glenn*, 131 U. S., 319.
>
> Notwithstanding this, the suit now complained of was instituted in the state court in behalf of stockholders and creditors, averring that the mortgage to the Central Trust Company by the Western North Carolina Railroad is void, the proceedings and sale thereunder and the order and decree of this court void, and the title made to the purchaser ordered and confirmed by this court void—all this in defiance of the order of injunction issued by this court when it took possession of and administered this mortgaged property, requiring all claimants to litigate in this court. It also seeks in the state court a reversal and annulling of the solemn

> decrees and orders of this court made in a cause in which these stockholders were privies. It is not to be supposed for a moment that the state court will be so regardless of the comity which does exist and should exist between the courts sitting within the same territory as to sit in judgment upon the validity of a decree of this court, or that it will assume jurisdiction in issues over which this court has for so long a period exercised and held jurisdiction. But this will not protect the parties who have sought in this collateral way to impeach the action and decree of this court. They can be reached by its injunction, because they were brought into, and are within, its jurisdiction. This is the unquestionable right and power of this court."

In *Root* v. *Woolworth*, 150 U. S., 401, the first decree and all proceedings thereunder had been completely closed for ten years before the ancillary bill was filed to protect the first decree, and the bill was held good.

## IV.

**There is not in this case any question involving the jurisdiction of the Circuit Court as a federal court. Therefore, the appeal was improperly taken direct to this court and should now be dismissed.**

The only ground upon which an appeal in this case direct from the Circuit Court to this court can be prosecuted by appellants is that jurisdiction of the Circuit Court *as a federal court,* was challenged, and therefore appellants insist that they have the right to appeal direct to this court.

We insist that the only challenge made to the jurisdiction of the Circuit Court was that a court of chancery had no power under the circumstances of this case to issue an injunction to protect its former decree, and that appellee, relying upon the former foreclosure decree in the federal court, should have appeared to the suit to re-foreclose in the state court, and there have pleaded the former federal court foreclosure decree as *res judicata*. This point was raised when this case was before the Court of Appeals, and that court held (166 Fed., 840) that the objection to the court's jurisdiction must be to its jurisdiction *as a federal court;* that the jurisdiction of the Circuit Court as a federal court had not been challenged, and that no issue concerning jurisdiction had been raised in the case "which would not be applicable alike were the bill filed in any court of equitable jurisdiction, state or federal." (p. 842.) The Court of Appeals thereupon held that the appeal had rightfully been taken to it and that it would proceed to decide the appeal.

When this court refused (212 U. S., 581) to grant a writ of *certiorari* to that decision of the Court of Appeals, it in effect upheld the Court of Appeals in that regard and practically decided that there was not in this record any question involving jurisdiction of the Circuit Court "as a federal court."

If that express decision of the Court of Appeals and that implied decision of this court are to stand, then we come to an immediate end of this argument, for, if the decision of the Circuit Court of Appeals was right and there was involved no question of such jurisdiction as would require or sustain an appeal

taken directly to this court, then this appeal has been improperly taken and must be dismissed.

As the Circuit Court of Appeals entertained the appeal, deciding that the appeal was properly taken to it and that there was no question of jurisdiction of the Circuit Court as a federal court involved, and as it had jurisdiction to make that decision, and as this court, by refusing a writ of *certiorari,* refused to disturb that decision, we further insist that it is now *res judicata* between the parties to this record that the former appeal to the Court of Appeals was properly taken, that there is no question of jurisdiction as a federal court involved in this case, and we further insist that, in the light of that adjudication, this appeal must now be dismissed for want of jurisdiction.

If, however, the question is open for discussion we submit the following argument:

Section 5 of the Court of Appeals Act provides that appeals or writs of error may be taken from the Circuit Courts directly to the Supreme Court,

> "In any case in which the jurisdiction of the court is at issue."

"Jurisdiction," as used in this statute, has repeatedly been construed to mean jurisdiction of the Circuit Court *as a federal court.* If the jurisdictional question raised is other than that of the court *as a federal court,* the appeal must be taken to the Court of Appeals, not to the Supreme Court.

*Courtney* v. *Pradt,* 196 U. S., 89.
*Louisville T. Co.* v. *Knott,* 191 U. S., 225.
*Crawford* v. *McCarthy,* 148 Fed., 198.
*Smith* v. *McKay,* 161 U. S., 355.

In *Louisville Trust Co.* v. *Knott*, 191 U. S., 225, almost the exact question here involved came up. The order appealed from stated:

> "This appeal is granted *solely upon the question of jurisdiction over the subject-matter* of the trust estate of the Evening Post Company in controversy, and the question of whether this court, or the said Jefferson Circuit Court, Chancery Branch, First Division, has prior jurisdiction in [is] the single question upon which this cause is decided as to the said Louisville Trust Company; this court holding that its jurisdiction over the said trust estate of the Evening Post Company is prior and exclusive of the said Jefferson Circuit Court, Chancery Branch, First Division, all of which is hereby certified on the appeal of the said Louisville Trust Company as Receiver, etc., to the Supreme Court of the United States for review as required by law." (pp. 225-6.)

On that certificate this court said:

> "The question presented by the certificate of the Circuit Court is not one of *jurisdiction within the meaning of the fifth section* of the act of 1891, and *the jurisdiction of that court was not 'in issue.'* There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a federal court, to take cogniizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that court, *as a Federal tribunal,* to appoint a receiver of the assets and property of the Evening Post Company." (p. 232.)

The court further said that the real question was

whether the action of the Circuit Court in taking possession

> "was in violation of the rule recognized in courts of equity, *whether of Federal or state origin*, that 'where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.' "

Thus the direct question involved in the case at bar and the question argued on behalf of appellants, was exactly the question in the *Knott* case, namely, the right of a court of equity, "*whether of federal or state origin,*" to enjoin proceedings in another court, and it was held that such a question is not one so involving jurisdiction that it can be taken directly to this court. The court further said:

> "In all this there was nothing involving the jurisdiction of the Circuit Court *as a federal tribunal,* whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court *as a federal court*, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other." (p. 233.)

In that opinion the court also referred to the case of *Blythe* v. *Hinkley*, 173 U. S., 506, saying:

> "The Circuit Court held that the remedy was *at law and not in equity.* That conclusion was not a decision that the Circuit Court had no jurisdiction *as a court of the United States.*" (p. 235.)

In our case the question is was it proper practice

to file an ancillary bill or file a plea of *res judicata* in the state court.

In *Courtney* v. *Pradt,* 196 U. S., 90, the case was removed from the state court to the Federal Circuit Court. There Pradt made a motion to dismiss the case "for want of jurisdiction to try the same." On the same day he filed a special demurrer, assigning as cause, *inter alia,* that the court *had no jurisdiction of the person or of the subject matter,* which is exactly the cause assigned in demurrers in the case at bar. The Circuit Court overruled a motion to remand, sustained the motion to dismiss, sustained the demurrer, and entered judgment *dismissing for want of jurisdiction* (p. 90). An appeal was prosecuted directly to this court, which considered whether such direct appeal was proper, and said (p. 91):

> "It is settled that the question thus to be certified is the jurisdiction of the Circuit Court *as a court of the United States,* and not in respect of its general authority as a judicial tribunal."

The court then held that such a question of jurisdiction did not appear *"distinctly and unequivocally,"* and said (p. 92):

> "No single and definite issue as to the jurisdiction of the Circuit Court as a Federal court is presented.
>
> It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the Federal courts *as contradistinguished from the state courts.* It did not in terms put in issue the power of the Circuit Court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, *or to attempt to eliminate every*

*other ground for the purpose of bringing the case within the first clause of section five."*

So it was positively held that it must distinctly and affirmatively appear that the lower court held that there was no jurisdiction *as a federal court,* and that simply challenging the jurisdiction of the court over the subject matter and the person does not raise the question which gives the right of direct appeal.

In *Crawford* v. *McCarthy, supra,* the court said:

> "Those causes, therefore, were but specific instances of the general objection covered by the seventh cause, namely, that the facts set forth in the bill were not sufficient to constitute a cause of action in equity. In *Smith* v. *McKay,* 161 U. S., 355, as in this case, objection was raised to the bill on the ground that the complainant had a plain and adequate remedy at law. Of this the court said: 'The objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in complainant's bill.' This view was again upheld in *Louisville Trust Co.* v. *Knott,* 191 U. S., 225."

The present case went to the Court of Appeals on demurrer when that court decided that there was not involved any question of jurisdiction of the Circuit Court as a federal court.

The demurrer was general with special causes added. Those special causes were as follows:

> "And for special cause of said demurrer this defendant showeth:
>
> First: That it appears on the face of the said bill that this Honorable Court is without jurisdiction, both over the subject-matter and parties to the suit.
>
> Second: That said bill is *not an ancillary*

bill, but is an original bill against this defendant, it appearing from said bill that this defendant was not a party to the proceedings referred to in the said bill of complaint, heretofore pending in this court."

The first cause denied the jurisdiction of the court both over the subject-matter and the parties, and the second cause assigned is substantially the same, for the demurrer charges that the bill is not an ancillary bill, because demurrant was not a party to the original foreclosure proceedings referred to in the bill.

If it is not an ancillary bill, then we concede that the Circuit Court had no jurisdiction over the cause, not because it was a federal court, but because, on general chancery principles, it could not enjoin a foreclosure suit previously begun.

Of course the Circuit Court had jurisdiction over the subject-matter, that is, it has jurisdiction in a proper case to protect its own decree and restrain proceedings antagonistic to and inconsistent with that decree. The property involved was real property confessedly within the jurisdiction of the court. Citizenship is immaterial in an ancillary suit. Appellants' objection is against the bill as an ancillary bill. It is exactly the same objection a party would make with the same end in view if the bill had been filed in one State Circuit Court against a proceeding in the State Circuit Court in another county.

Appellants insist the bill is no ancillary because they were not parties to the former foreclosure suit. They practically concede that if they were such parties, the bill is a good ancillary bill and the federal court had power to entertain it.

If it is decided that the bondholders are bound by the representation of their trustee, then, almost confessedly, the bill was good as an ancillary bill. On the other hand, if it is held that they were not bound by the representation of their mortgage trustee, we concede that the bill should have been dismissed for want of equity or for want of jurisdiction on the part of any chancery court, *state* or *federal*, to enjoin the later foreclosure proceedings brought in another court.

## V.

### Diverse Citizenship.

One objection to the jurisdiction, urged by appellants' counsel, is that the bill shows a want of proper diverse citizenship. This question is not and cannot be involved in the present litigation. If the bill is properly an ancillary bill, citizenship becomes unimportant, and if it is not an ancillary bill, we concede that it should have been dismissed. In *Julian* v. *Central Trust Co.*, 193 U. S., 93, in discussing a similar case the court said (p. 113):

> "In such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill, *irrespective* of the *citizenship* of the parties."

In *Root* v. *Woolworth*, 150 U. S., 401, the court said (p. 413):

> "The bill *being ancillary* to the original proceeding of Morton against Root, and supplementary to the decree rendered therein, *can be maintained without reference to the citizenship*

*or residence of the parties.* There is consequently no force in the objection that the court below had no jurisdiction in this case because the appellee and the appellant were both citizens of Nebraska. *Krippendorf* v. *Hyde*, 110 U. S., 276; *Pacific Railroad* v. *Mo. Pacific Ry.*, 111 U. S., 505."

We therefore never can reach the question of consideration of citizenship. At the same time, as the question has been raised and urged, we would call attention to the fact that the citizenship in this case is proper for jurisdiction of the Federal Court.

The complainant, Alton Water Company, is a corporation and citizen of Illinois, and all of the defendants except Lewis and Zoline are citizens of states other than Illinois. Therefore, leaving out Lewis and Zoline, the citizenship was proper for federal jurisdiction. The only allegation in the bill concerning Lewis and Zoline is that in these proceedings they are acting as attorneys for the parties in interest. They are unnecessary parties; they are hardly proper parties; they are only formal parties. The bill is a bill for an injunction. The only interest of Lewis and Zoline is that they are attorneys for parties sought to be enjoined. An injunction against the parties in interest "and their solicitors, attorneys and agents," would be sufficient to bind Lewis and Zoline without their names being mentioned in the bill or the injunction. While, therefore, they may possibly be *formal* or even *proper* parties, they are not *necessary* parties, and therefore they cannot be considered in determining whether requisite diversity of citizenship exists. That question is determined by the citizenship of the

*necessary* parties. Lewis and Zoline could be dismissed from the bill without changing its frame or prayer, and the relief prayed for could then be had upon the bill just as fully as if they had remained parties.

No serious question can arise here that the defendants are not sued in the district in which they reside. The suit is one involving the prosecution of a foreclosure suit and involving real estate in the district in which the suit at bar was brought. It was therefore proper to bring the suit in that district regardless of the *residence of the defendants.*

Moreover, appellants presenting this objection filed a general appearance in the case.

## V I.

**No question can be raised in this case as to whether the Circuit Court erred in the first foreclosure case in overruling a motion to remand and in retaining jurisdiction.**

Appellants seek to question the removal of the original Madison County Circuit Court litigation into the federal Circuit Court at Springfield. Much space is given in appellants' argument to the discussion of that removal. That question cannot be raised in the present case. The Circuit Court in the original litigation overruled a motion to remand. In the appeal taken by the International Trust Company the ruling on the motion to remand was urged as error. The Circuit Court of Appeals sustained

the order refusing to remand. This court denied a petition of *certiorari* to review that ruling. Thereupon the regularity of that removal became absolute, binding upon all the parties to the cause, including the International Trust Company, and also, we insist, upon its bondholders, the present appellants. Certainly that ruling cannot now be questioned in a collateral proceedings.

In *Dowell* v. *Applegate*, 152 U. S., 339, it was held that, while judgments and decrees of the federal courts should show somewhere in the record proper jurisdictional facts, such as citizenship, and that such judgments and decrees are erroneous if they do not do so and may be reversed, yet, until reversed they are valid and binding upon all parties. The court further said:

> "These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court." (p. 340.)

In considering what class of jurisdictional questions must be involved to justify an appeal direct from the Circuit Court to this court, it is said in 1 Rose's Federal Procedure, Section 42, note b:

> "The jurisdictional question must be one aris-

ing in the pending suit and not a question of the court's jurisdiction to render a decree in a prior cause."

In *Carey* v. *Houston R. Co.*, 150 U. S., 170, certain stockholders filed an original bill to set aside a decree of foreclosure, alleging fraud in the foreclosure case and that the Circuit Court rendering the foreclosure decree did not have jurisdiction on account of lack of diverse citizenship. The stockholders' bill was dismissed, and they took an appeal direct to this court on the ground that a jurisdictional question was involved. A motion was made to dismiss the appeal, and the court held that the jurisdictional question supporting a direct appeal must be one arising in the case appealed and that the alleged defect of jurisdiction in the former foreclosure case, on account of lack of diversity of citizenship, could not be used to raise a question of jurisdiction of the court so as to allow of an appeal direct to the Supreme Court. In so holding the court said:

"It is contended that the question of jurisdiction was in issue because the bill attacked the jurisdiction of the Circuit Court over the foreclosure suit, or its jurisdiction to make the decree of foreclosure and sale of May 4, 1888, passed in that suit. But the fifth section of the act of March 3, 1891, does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the Circuit Court *over another suit previously determined* in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to pre-

> vent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding." (p. 180.)

The petition to remove the original litigation from the state court to the federal court was made by the Boston Water & Light Company, one of Venner's companies. (Rec., 171.) The motion to remand was made by the Farmers' Loan & Trust Company, complainant in the original foreclosure case. The order overruling the motion to remand appears on page 253 of the record and recites, among other things, that Messrs. Patton, Hamilton & Patton opposed the motion to remand on behalf of the parties for whom they appeared. They had before the argument on the motion to remand appeared for the International Trust Company. The order also recites that the motion to remand was opposed by Mr. Baker on behalf of the parties for whom he appeared, and he had theretofore appeared for the New England Water Company, of which Mr. Venner was president. We, therefore, have not only the trustee of the appellants, but also Mr. Venner himself, through one or two of his companies, at that time opposing the motion to remand, and now insisting that the Circuit Court erred in not granting the motion to remand. They cannot be now heard to allege error in the order which they so took part in urging and obtaining.

## VII.

**Any attempt to review or reconsider the foreclosure decree entered in the Federal Court must be prosecuted in that court and in that foreclosure cause.**

The present suit in the state court is really an attempt to impeach collaterally the Federal Court foreclosure decree.

It is sought to compel the purchaser who holds under the original foreclosure decree to come into the state court, there set up the federal decree by plea of *res judicata* and allow the state court to determine the validity of that decree or the construction to be placed thereon.

In *Richter* v. *Jerome*, 123 U. S., 245, after the foreclosure had been completed, a bondholder, claiming that he was not bound by representation by the trustee, started a new proceeding seeking to reforeclose the trust deed that had been involved in the former foreclosure suit. The court said:

> "The bill was not filed to set aside the decree in the suit brought by the Union Trust Company to foreclose its mortgage. * * * Neither is it sought to hold the Union Trust Company accountable for its alleged misconduct and breach of faith in the proceedings for the foreclosure of the mortgage." (p. 245.)
>
> "The bondholders were represented in the suit by their trustee, and are bound by the decree so long as it stands unreversed, and is not set aside or vacated." (p. 247.)
>
> "If the decree or the sale under it was in fraud of the rights of the bondholders, *their remedy is by a direct proceeding* to set aside the

> sale or the decree, and to proceed anew with another foreclosure of the mortgage, and not to undertake to *reforeclose* what had been fully foreclosed before under a decree which *remains in force.*" (p. 247.)

In *Maloney* v. *Dewey*, 127 Ill., 395, the 5th item of the syllabus is as follows:

> "So where a decree of strict foreclosure has been rendered in the Circuit Court of the United States against a lunatic or insane person, that court is the proper forum in which to apply for a relief against the decree. The state courts have no power or authority to review, revise and correct such decree."

In *Kent* v. *Lake Superior Co.*, 144 U. S., 75, which was a proceeding brought by a bondholder, there had been a foreclosure proceeding in which the entire proceeds of the sale were absorbed by receiver's certificates, which the mortgage trustee had consented to. Subsequently, in another jurisdiction, certain bondholders sought to impeach the former proceedings as fraudulent and erroneous. The court held the action of the trustee, in consenting to receiver's certificates, bound the bondholders, and on page 88 said:

> "If there was error in the decree, or in the sale, the remedy of plaintiff was in the court which rendered the decree and confirmed the sale."

Appellants had their day in court. The validity of their mortgage was passed on. Their main contention was overruled. The lien of their mortgage was held inferior to that of the Farmers Loan & Trust Company. There was a sale and the property is now in the hands of third parties claiming

under that sale. They appealed many times. They availed themselves of all remedies afforded by law. They acted in accordance with the cases cited in this point. There must be some end to litigation.

In insisting that we are entitled to enjoin a relitigation in the state court, we are not unmindful that we could go to the state court and present the record of the first foreclosure case in a plea of *res judicata*. That we have that right does not, however, in any way affect or interfere with our right to pursue the remedy afforded by the suit now at bar.

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